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No. 93-____

IN THE

Supreme Court of the United States

October Term, 1993

BANKRUPTCY PLAN COMMITTEE
OF THE BANK BUILDING & EQUIPMENT CORP.
OF AMERICA, IN LIQUIDATION

Petitioner,

vs.

RELIANCE INSURANCE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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54 pp

QUESTIONS PRESENTED

1. Where the trustee of a company in liquidation pursuant to a federal liquidation statute asserts claims against the company's directors and officers, are the directors and officers covered for such claims under a liability insurance policy which generally covers claims against directors and officers, including shareholders derivative claims, but excludes coverage for other claims made by or on behalf of the company?

2. Where a federal statute vests the trustee of a company in liquidation with all rights to pursue claims in the nature of shareholders derivative claims, and the trustee asserts such claims against directors and officers of the company, are the directors and officers covered for the claims under a pre-existing policy of directors and officers liability insurance, which policy expressly covers shareholders derivative claims?

LIST OF PARTIES

Petitioner Bankruptcy Plan Committee was elected by the unsecured creditors of the now-defunct Bank Building & Equipment Corporation of America and two of its wholly-owned subsidiaries to serve as trustee of their consolidated bankruptcy estates. The members of the Bankruptcy Plan Committee are H. Bernard Engel, James Burzynski, and Arthur Shafer. Richard Miller is liquidation and distribution agent for the Bankruptcy Plan Committee.

Respondent Reliance Insurance Company, a Pennsylvania corporation, issued the subject policy of directors and officers liability insurance to Bank Building & Equipment Corporation of America.

Carl J. Weis, Jr., Myron Carpenter, and Douglas Clements are former directors or officers of Bank Building & Equipment Corporation of America. They were parties in the declaratory judgment action below and retain a direct interest in the outcome of the petition.

Numerous unsecured creditors have filed claims with the bankruptcy estate of Bank Building & Equipment Corporation of America, in liquidation. The primary unsecured creditor is The Boatmen's National Bank of St. Louis. The unsecured creditors are also interested in the outcome of the petition.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is unpublished. A notation of the decision appears at 5 F.3d 532 (8th Cir. 1993) (Table). The decision of the court of appeals is reproduced at pages 23a-24a of the Appendix to this Petition ("App. 23a-24a"). The decision of the United States District Court for the Eastern District of Missouri is published as *Reliance Insurance Co. v. Weis,* 148 Bankr. 575 (E.D. Mo. 1992), and is reproduced at App. 7a-22a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment September 23, 1993. This petition is filed within 90 days after entry of that judgment per Supreme Court Rule 13.1. This Court has jurisdiction to issue its writ of *certiorari* pursuant to 28 U.S.C. § 1254.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 from the final judgment of the district court entered December 18, 1992. The Bankruptcy Plan Committee timely filed its notice of appeal January 13, 1993.

Jurisdiction in the district court was based on complete diversity of citizenship pursuant to 28 U.S.C. § 1332. At the time the complaint was filed, plaintiff Reliance Insurance Company was a citizen of Pennsylvania, defendant Clements was a citizen of Illinois, and defendants Richard Miller, liquidation and distribution agent of the Bankruptcy Plan Committee, Weis, and Carpenter were citizens of Missouri. The amount at issue in the case is $5,000,000.

STATUTES INVOLVED

United States Bankruptcy Code.

> The trustee in a case under this title is the representative of the estate.

11 U.S.C. § 323(a).

> The commencement of a case ... creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) ... all legal or equitable interests of the debtor in property as of the commencement of the case ....

11 U.S.C. § 541(a)(1).

STATEMENT OF THE CASE

1. The Bank Building & Equipment Corporation of America ("BBC") was a publicly traded company incorporated in Delaware in 1929 whose primary business was the design and construction of facilities for banks and other financial institutions in all fifty states and the District of Columbia.

As the result of the negligent failure some of BBC's executive officers to supervise senior management of one of its divisions (some of whom were carrying on a fraudulent scheme), BBC suffered total financial collapse, involving losses in excess of $50,000,000. BBC filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code on April 30, 1990. *In re Bank Building and Equipment Corporation of America,* Case No. 90-402011-293 (Bkrtcy. E.D. Mo.). The bankruptcy court approved a plan of liquidation (the "Plan") on July 22, 1991. Relevant portions of the Plan are reprinted at App. 5a-6a.

2. Petitioner, the Bankruptcy Plan Committee, is a three-member committee created by the Plan to represent the interests of the unsecured creditors of BBC and two of its wholly-owned subsidiaries, also in bankruptcy. Under the Plan, the Bankruptcy Plan Committee serves, in effect, as trustee of the three consolidated bankruptcy estates. App. 5a-6a. Acting pursuant to the Plan, the Bankruptcy Plan Committee filed suit against three former officers of BBC in the Circuit Court for St. Louis County, Missouri. *Richard Miller v. Doug Clements, et al.,* Cause No. 630962. That case is still pending.[1]

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[1] Mr. Miller is liquidation and distribution agent for the Bankruptcy Plan Committee pursuant to the Plan. *See* App. 5a. The full name of the plaintiff in the St. Louis County action is "Richard Miller, as the Liquidation and Distribution Agent on behalf of H. Bernard Engel; James Burzynski, as the representative of Jim & Slim's Tool Supply; and Arthur Shafer, as the representative of Morgan Drive-Away, Inc., acting in the name of the Plan Committee for the Bankruptcy Estate of Bank Building and Equipment Corporation of America."

3. Prior to the officers' neglect and breach of duty, BBC had obtained a policy of directors and officers liability insurance (the "Policy") issued by Respondent, Reliance Insurance Company ("Reliance"). App. 2a-4a. The Policy remained in effect at all times relevant to this case. The Policy provides in relevant part that:

> The Insurer will pay on behalf of the Directors and Officers all loss which the Directors and Officers or any of them shall become legally obligated to pay as a result of any claim or claims first made during the policy period against the Directors and Officers, individually or collectively, for a Wrongful Act. ...
>
> "Wrongful Act" shall mean any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by the Directors and Officers in the discharge of their duties, individually or collectively, or any matter claimed against them solely by reason of their being Directors or Officers of the Company.

App. 2a, 3a.

The amount of coverage provided to the directors and officers by the Policy is $5,000,000. App. 2a.

Reliance was provided with the required notice of potential claims under the Policy and, once suit was filed against the former officers, the officers demanded that Reliance provide them with a defense and indemnify them up to the Policy limits. Reliance refused coverage, claiming that the suit brought by Mr. Miller in the name of the Bankruptcy Plan Committee was excluded from coverage because of, *inter alia,* the following exclusion in the Policy:

> The Insurer shall not be liable to make any payment for loss in connection with any claim made against the Directors or Officers: ... by or on behalf of a Director and/or Officer, or by or on behalf of the "Company", except for stockholder(s) derivative actions brought by a shareholder(s) of the Company other than a Director and/or Officer.

App. 4a.[2]

4. Reliance filed the present case as a declaratory judgment action February 20, 1992 in the United States District Court for the Eastern District of Missouri, seeking a declaration that the former officers were not entitled under the Policy to coverage for the Bankruptcy Plan Committee suit.

Cross-motions for summary judgment were filed regarding the effect of the above-quoted Policy exclusion. While Reliance admitted that the Bankruptcy Plan Committee suit was not brought "by" BBC, it contended that the action was brought "on behalf of" BBC within the meaning of the Policy exclusion. The Bankruptcy Plan Committee and the former officers, arguing in support of coverage, contended, *inter alia,* that (a) in a liquidating bankruptcy in which neither the debtor nor its shareholders will receive any distribution from the estate, the bankruptcy trustee acts on behalf of the creditors, not the debtor; and (b) because, under bankruptcy law, a shareholder's right to bring a derivative action in the right of the debtor corporation vests in the bankruptcy trustee, the Bankruptcy Plan Committee's suit was the equivalent of a shareholder's derivative action for purposes of the Policy, and thus covered.

The district court acknowledged that the dispute involved issues of both contract and bankruptcy law. As to the

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[2] The exclusion, which is commonly referred to by the insurance industry as an "insured v. insured" exclusion, was not part of the original Policy but was added by Endorsement 1 to the Policy. *See* App. 10a-11a.

contract law issues, the district court concluded, "that since Reliance is the drafter of the policy and did address the issue of bankruptcy elsewhere in the policy, then it appears reasonable to conclude that if Reliance had wanted to expressly address the issue of bankruptcy in Endorsement 1, it would have done so." App. 15a.

Despite this conclusion, which would appear to require a finding of coverage under the Policy, the district court went on to examine "what is meant, under bankruptcy law, by the phrase 'on behalf of the Company'." App. 15a. The district court, after an examination of the nature of a bankruptcy estate and an analysis of the duties and powers of a bankruptcy trustee, concluded:

> It is this Court's considered opinion that pursuant to the Bankruptcy Code, the Liquidation Plan, the Disclosure Statement, and the relevant caselaw, whatever right of action BBC had against its former officers for mismanagement and breach of fiduciary duty was transferred to the bankruptcy estate upon the filing of its bankruptcy petition. Once BBC was liquidated, Agent Miller and the Plan Committee were obligated to pursue BBC's right of action in order to recover assets for BBC's estate. The purpose of the pending state court action is to recover all available funds for distribution to BBC's creditors. It is clear that the pending state court action was filed on behalf of BBC and its estate, although the benefits sought may eventually inure to the creditors. For purposes of this litigation, there is no significant legal distinction between BBC and its bankruptcy estate.

App. 20a-21a.

The district court granted Reliance's motion for summary judgment and denied the motions filed by the Bankruptcy Plan Committee and the former officers. *Reliance Insurance Co. v. Weis,* 148 Bankr. 575 (E.D. Mo. 1992). App. 7a-22a.

5. The Bankruptcy Plan Committee and former officer Weis appealed the district court's judgment to the United States Court of Appeals for the Eighth Circuit. In an unpublished *per curiam* decision, the court of appeals affirmed the judgment "on the basis of the well-reasoned opinion of the district court." App. 24a.

REASONS FOR GRANTING THE WRIT

In recognition of the importance that corporations and financial institutions play in our economy and of the harm to the public that can accompany their failure, Congress has established comprehensive federal legislative schemes for the liquidation of bankrupt corporations and insolvent financial institutions. This case concerns the interplay between these federal statutory liquidation procedures and liability insurance coverage for claims of misconduct or negligence asserted by a statutory trustee against directors and officers of a failed entity. Such claims, if covered by a pre-existing policy of directors and officers liability insurance, may be one of the more valuable assets available to the trustee to satisfy the obligations of the failed entity.

Federal courts grapple with the questions presented in the petition on a regular basis as they face a steady and unending stream of bankruptcies and bank closings. In deciding these questions, however, the courts have reached conflicting answers. The lack of a definitive, uniform rule in this area is especially troublesome given that standardized insurance policies are sold throughout the United States. The courts, as well as corporations, banks, insurance companies, bankruptcy trustees, the Federal Deposit Insurance Corporation (FDIC), and the Resolution Trust Corporation (RTC), are all in

need of the Court's resolution of these important and recurring questions.

Furthermore, directors and officers liability insurance is now a mainstay of the corporate environment. Many honest and capable individuals would not accept a position as director or officer of a corporation or financial institution unless insured against suits brought against them. The decision below, by removing this important protection at a time, during the liquidation of the entity, when it would be most needed, jeopardizes the ability of corporations and financial institutions to attract qualified individuals to serve as their directors and officers.

I. THE QUESTIONS PRESENTED IN THIS PETITION ARISE FREQUENTLY.

The question of whether a claim brought by a federal statutory trustee or receiver against directors and officers of a failed entity is brought "on behalf of" the entity within the meaning of a directors and officers liability insurance policy containing an "insured vs. insured" exclusion is one which arises frequently. *See* cases cited *infra* in Section II at pp. 10-13.

One reason for the frequency with which the questions presented arise is the nature of the bankruptcy estate.

> The commencement of a [bankruptcy] case ... creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: ... all legal or equitable interests of the debtor in property as of the commencement of the case ....

11 U.S.C. § 541(a)(1).

A corporate debtor's claims against its directors and officers for breach of duty or misconduct is "property" which vests in the estate upon the filing of bankruptcy. "While

normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee." *Pepper v. Litton,* 308 U.S. 295, 307 (1939); *Koch Refining v. Farmers Union Central Exchange, Inc.,* 831 F.2d 1339, 1343-44, 1348 (7th Cir. 1987). "The § 541 estate, thus, includes any right of action the debtor corporation may have to recover damages for misconduct, mismanagement, or neglect of duty by a corporate officer or director. The trustee in bankruptcy succeeds to that right. Its nature is derivative. *See* 4 Collier on Bankruptcy ¶ 541.10[8] (15th ed. 1983)." *Delgado Oil Co., Inc. v. Torres,* 785 F.2d 857, 860 (10th Cir. 1986).

Thus the questions presented has the potential to arise in *every* bankruptcy in which (1) there is an outstanding potential claim against the directors or officers, and (2) there is in effect a policy of directors and officers liability insurance.

While most cases considering the questions presented have arisen in the context of an FDIC, FSLIC or RTC receivership liquidation of a failed financial institution, those cases are directly analogous to the present case arising out of a bankruptcy trustee's liquidation of a failed commercial corporation. *Office and Professional Employee's Int'l Union, Local 2 v. FDIC,* 962 F.2d 63, 68 & n.9 (D.C. Cir. 1992) (opinion by Ruth Bader Ginsburg, J.) (using bankruptcy law as most analogous statutory regime for deciding claim requirements under FIRREA, the Financial Institution Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1821); *Zeleznik v. Grand Riviera Theater,* 128 F.2d 533, 536 (6th Cir. 1942) (analogizing stockholder's derivative action for director's breach of fiduciary duty to claims of stockholders or depositors against the directors of national banks in liquidation).

With the ongoing consolidation of the banking industry and continuing fall-out from the failure of many of the

nation's banks and savings and loans, one can be confident that the questions presented will arise again many times in the future in the context of the liquidation of failed financial institutions.

II. THE LOWER FEDERAL COURTS ARE IN CONFLICT IN THEIR RESOLUTION OF THE QUESTIONS PRESENTED.

While most of the courts that have considered the questions presented have held that an action brought by a trustee or receiver is not brought on behalf of the debtor, a substantial minority—including the courts below—have ruled to the contrary. These conflicting decisions have led to uncertainty in the application of the federal liquidation statutes. This is most unfortunate given the need for uniformity in the application of these statutes to the interpretation of directors and officers liability insurance policies sold in standard fashion throughout this country.

A. Courts That Hold That There Is Coverage.

Many of the lower federal courts have held that the "insured vs. insured" exclusion does not apply to actions brought by a trustee or receiver who succeeds to the interests of the insured by virtue of a federal liquidation statute. Most of these courts have placed particular emphasis upon the portion of the exclusion providing coverage for shareholder derivative suits. Those courts have held that where an "insured v. insured" exclusion contains an exception from the exclusion for shareholder derivative suits, as is typically the case, the sole purpose of the exclusion is to prevent collusive lawsuits among the officers of a failing company. *American Casualty Co. v. FDIC*, 791 F. Supp. 276, 278 (W.D. Okla. 1992) ("The obvious intent ... is to protect the insurer from collusive suits"). These cases hold that the exception to the exclusion for shareholder derivative actions *compels* the conclusion that the "insured v. insured" exclusion does not

exclude coverage for actions by a successor to a defunct institution:

> This issue is decided by the existence of the exception for shareholder derivative actions in the "insured v. insured" exclusion. The existence of this exception demonstrates that [the insurer] intended to place itself on the risk for actions against the directors and officers based upon allegations of mismanagement, waste, fraud or abuse of [the bank]. These are precisely the claims being brought by FDIC against the directors and officers now. The obvious intent behind the "insured v. insured" exclusion is to protect [the insurer] against collusive suits among [the bank] and its directors and officers.

Fidelity & Deposit Co. v. Zandstra, 756 F. Supp. 429, 431 (N.D. Cal. 1990) (FDIC suit not within exclusion, even though FDIC took over suit filed by bank *before* bank became defunct (*id.* at 432)). *See American Casualty Co. v. Baker*, 758 F. Supp. 1340 (C.D. Cal. 1991), where "the Court adopt[ed] the sound reasoning of Judge Schwarzer in *Zandstra*," and concluded "there can be no real dispute that FDIC is a genuinely adverse party to the defendant officers and directors." *Id.* at 1349-50.[3] *See also American Casualty Co. v. FDIC,* 791 F. Supp. 276, 277-78 (W.D. Okla. 1992) (citing cases); *FDIC v. National Union Fire Insurance Co.,* 630 F. Supp. 1149, 1157 (W.D. La. 1986) ("to the extent that such action is analogous to a shareholders' derivative action

[3] In *Baker,* as in some of the other FDIC cases, the court held that, although the "insured vs. insured" exclusion did not exclude coverage, there was no coverage for the claim made by the FDIC by virtue of a separate exclusion, commonly known as the "regulatory exclusion", which specifically excludes coverage for losses to directors and officers resulting from claims made by the FDIC or other regulatory agencies. *Baker,* 758 F. Supp. at 1341. The regulatory exclusion is not an issue in the present case.

coverage may be provided"); *Finci v. American Casualty Co.*, 323 Md. 358, 593 A.2d 1069, 1081-82 (1991)[4].

Even where the exclusion does not expressly retain coverage for shareholder derivative actions, it has been held that the exclusion applies only to the entities *actually named* in the policy as insureds. "The endorsement lists distinctly those persons and entities to whom it applies." *FDIC v. American Casualty Co.*, No. 90-CV-0265-J, 1991 U.S. Dist. Lexis 19247 (D. Wyo. July 3, 1991); *Continental Casualty Co. v. Allen*, 710 F. Supp. 1088, 1098 (N.D. Tex. 1989) (definition of "insured" ambiguous if said to include successor like FDIC).

Furthermore, even courts which have rejected the conclusion that the sole purpose of the "insured v. insured" exclusion is the prevention of collusive suits have held that the exclusion does not bar claims by the FDIC because the FDIC also succeeds to the rights of the shareholders in the institution. "In this case, the FDIC ... can also stand in the shoes of the shareholders; therefore, as a shareholder, it has the independent authority to bring a suit ...." *FDIC v. Zaborac*, 773 F. Supp. 137, 144 (C.D. Ill. 1991), *aff'd sub nom FDIC v. American Casualty Co. of Pennsylvania*, 998 F.2d 404 (7th Cir. 1993) (not reaching issue of scope of "insured v. insured" exclusion). "FSLIC does not merely stand in the shoes of Home Savings.... [S]ince endorsement 6 does not exclude claims brought on behalf of shareholders, creditors, and the insurance fund, FSLIC's claims are covered." *Branning v. CNA Insurance Co.*, 721 F. Supp. 1180, 1184 (W.D. Wash. 1989). "[T]he stated purpose of the policy is to insure the officers and directors against loss from claims made for breach of duty. This purpose would be entirely defeated or very severely restricted if suits brought by the FSLIC were not covered. Therefore, it would not be unreasonable for such a broad exclusion, if intended, to be stated expressly."

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[4] *Finci* concerned a receiver appointed by a state deposit insurance fund analogous to the FDIC.

American Casualty Co. v. FSLIC, 704 F. Supp. 898, 901 (E.D. Ark. 1989)

B. Courts That Hold That There Is No Coverage.

Other courts have rejected the contention that a director or officer has coverage for a suit by a receiver or trustee if the policy contains an "insured v. insured" exclusion. "We find that the FDIC's action is not 'derivative' ...." *Fidelity & Deposit Co. v. Conner*, 973 F.2d 1236, 1240-41 (5th Cir. 1992). *See also* the decision below, *Reliance Insurance Co. v. Weis*, 148 Bankr. 575 (E.D. Mo. 1992), *aff'd without opp.* 5 F.2d 532 (8th Cir. 1993) (Table); *Powell v. American Casualty Co.*, 772 F. Supp. 1188 (W.D. Okla. 1991); *Gary v. American Casualty Co.*, 753 F. Supp. 1547, 1549-50, 1555 (W.D. Okla. 1990) (finding FDIC action to be a claim made by "Institution" within meaning of exclusion), *aff'd* on "regulatory exclusion" grounds only *sub nom FDIC v. American Casualty Co.*, 975 F.2d 677, 683 (10th Cir. 1992) ("unnecessary to discuss the validity and scope of the insured v. insured endorsement"); *Mt. Hawley Insurance Co. v. FSLIC*, 695 F. Supp. 469, 481 (C.D. Cal. 1987) (finding no coverage where exclusion expressly excluded coverage of "shareholders' derivative suits and/or representative class action suits"); *Evanston Insurance Co. v. FDIC*, Case No. CV88-0407 WDK (Bx), 1988 U.S. Dist. Lexis 16263 (C.D. Cal. 1988) (concluding that all claims are potentially derivative depending upon the willingness of the board to pursue the claim, and therefore only derivative claims *in esse* are within the exception to the exclusion).

III. THE COURT OF APPEALS WRONGLY DECIDED THE QUESTIONS PRESENTED.

The decision below was incorrectly decided for several reasons. First, by holding that the bankruptcy trustee acted on behalf of the debtor, the courts below erroneously ignored the separate legal existence of the estate as well as the

trustee's legal obligation to act on behalf of the creditors and, secondarily, the shareholders—not the debtor. Second, the courts below ignored the rule that, once bankruptcy is filed, the right to bring derivative actions is transferred by action of law from the shareholders to the trustee.[5]

A. The Debtor Company And Its Bankruptcy Estate Are Two Separate And Distinct Legal Entities; The Trustee Acts On Behalf Of The Creditors, Not The Debtor.

The courts below held that, in bringing suit against the former officers, the Bankruptcy Plan Committee, acting in its role as trustee in bankruptcy, was acting "on behalf of" the debtor, BBC. App. 20a-21a.[6] The Bankruptcy Code, however, specifically provides that "[t]he trustee in a case under this title is the representative *of the estate*," 11 U.S.C. § 323(a)—not the representative of the debtor. *See also Matter of Met-L-Wood Corp.*, 861 F.2d 1012, 1017 (7th Cir. 1988) ("The trustee in bankruptcy is the creditors' representative"). Furthermore, the holding of the district court adopted by the court of appeals ignored the separate legal existence of the bankruptcy estate and the debtor:

> The filing of a Chapter 11 petition does, however, cause a fundamental *legal change* in the entity. The filing entity is legally different from what it was the moment before filing, as it now assumes the mantle of a new juridical entity, a debtor-in-possession.... As a *de jure*

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[5] The courts below also erred by not applying the well-reasoned majority rule stated in the cases cited in Section II-A, *supra* at pp. 10-13.

[6] Neither the bankruptcy estate nor the bankruptcy trustee were named in the exclusion. The district court, in its opinion adopted by the court of appeals, noted that, given the numerous other provisions of the Policy dealing with bankruptcy issues, if Reliance had intended to include actions brought by a trustee in bankruptcy in the "insured v. insured" exclusion, "it would have done so." App. 15a.

> trustee, the debtor-in-possession holds its powers in trust for the benefit of creditors.

In re V. Savino Oil & Heating Co., Inc., 99 Bankr. 518, 524-25 (Bkrtcy. E.D.N.Y. 1989). "In that capacity, the trustee acts to benefit the debtor's estate, which ultimately will benefit the debtor's creditors upon distribution." *Koch Refining, supra*, 831 F.2d at 1348.

> The trustee is not the same entity as the pre-bankruptcy debtor, but is a new entity with his own rights and duties, subject to the supervision of the bankruptcy court. The trustee acts as the representative of the estate, managing its funds *for the benefit of its creditors.*

In re Fidelity America Financial Corp., 43 Bankr. 74, 77 (Bkrtcy. E.D. Pa. 1984) (emphasis added).

A few cases have held that while perhaps an ordinary successor or assignee of a defunct entity might be barred by the "insured v. insured" exclusion, the special nature of the FDIC as receiver, in which it serves as a representative of the interests not only of its predecessor bank but also its creditors and shareholders, takes the receiver outside the exclusion. *FDIC v. Zaborac*, 773 F. Supp. 137, 143-44 (C.D. Ill. 1991); *Branning v. CNA Ins. Co.*, 721 F. Supp. 1180, 1184 (W.D. Wash. 1989). Because a bankruptcy trustee, such as the Bankruptcy Plan Committee, also represents the creditors and shareholders, *Pepper v. Litton, supra; accord Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) (noting that there is nothing anomalous in the trustee' actions benefiting the creditors only); the same reasoning applies here to take the Bankruptcy Plan Committee outside the exclusion.

B. Once Bankruptcy Is Filed, The Shareholders Are Barred From Bringing Derivative Actions, And Their Rights To Bring Such Actions Vest In The Trustee.

It has long been established that, once a petition in bankruptcy has been filed, the bankruptcy trustee takes over the right of the shareholders to bring an action against former directors and officers of the debtor corporation:

> While normally that fiduciary obligation is enforceable directly by the corporation, or through a shareholder's derivative action, it is, in the event of the bankruptcy of the corporation, enforceable by the trustee. For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders.

Pepper v. Litton, 308 U.S. 295, 307 (1939). The trustee's action against the directors and officers is derivative in nature. *Delgado Oil Co., Inc., supra*, 785 F.2d at 860. The fact that the shareholders had not brought a derivative suit prior to the suit filed by the Bankruptcy Plan Committee does not make the present action any less in the nature of a derivative suit. *See Zaborac, supra*, 773 F. Supp at 144 n.5. *See also* FDIC *v. Mijalis*, 800 F. Supp. 397 (W.D. La. 1992) (action brought by FDIC without fulfilling formalities of a shareholder's derivative action is nonetheless in the nature of a shareholder's derivative action).

Once bankruptcy was filed, the shareholders were barred from bring shareholders derivative actions. "Actions for breach of fiduciary duty become property of the estate which the Trustee alone has the right to pursue after the filing of bankruptcy petition." *In re Ionosphere Clubs, Inc.*, 156 Bankr. 414, 439 (S.D.N.Y. 1993), citing *Pepper v. Litton, supra. Accord Harmsen v. Smith*, 542 F.2d 496, 500-01 n.2

(9th Cir. 1976) ("Any derivative cause of action that the shareholders may have against the directors is an asset of the bank, and may be pursued solely by the FDIC"). Only if the Bankruptcy Plan Committee were to abandon its suit, would the claim against the former officers revert to BBC to be brought on its behalf, either directly or though a shareholders derivative suit. "If the trustee chooses not to prosecute an action on behalf of the estate, the cause of action revests in the debtor, who can then assert title." *Koch Refining, supra,* 831 F.2d at 1346 n.9 and cases cited therein.

> It is true, of course, that under certain circumstances a shareholder may assert a cause of action of the debtor even after the commencement of a bankruptcy proceeding. For example, the trustee may abandon a particular claim, making it possible for others to assert it. Also, the bankruptcy court may order the trustee to abandon a claim. But in these cases, some proceeding in the bankruptcy court must take place before a shareholder can assert the right directly.

Mitchell Excavators, Inc. v. Mitchell, 734 F.2d 129, 131-32 (2d Cir. 1984) (citations omitted).[7]

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[7] Given that courts are in conflict regarding whether the "insured v. insured" exclusion applies in the present circumstances, the provision is, as a matter of law, ambiguous. "[A]n ambiguity exists when the language in a contract permits two or more reasonable interpretations." *Hallowell v. State Farm Mutual Auto. Insurance Co.,* 443 A.2d 925, 926 (Del. 1982). Under Delaware law, which is the law applicable to the contract, "ambiguity must be resolved in favor of the insured and against the insurer ...." *New Castle County v. Hartford Accident & Indemnity Co.,* 933 F.2d 1162, 1182 & n.43 (3rd Cir. 1991).

IV. THE QUESTIONS PRESENTED RAISE IMPORTANT POLICY CONCERNS.

This Court should grant its writ of *certiorari* because of the important public policy concerns raised by the decisions below.

A. The Decision Below Would Discourage Honest And Capable Persons From Serving As Directors Or Officers Of Corporations And Financial Institutions.

It is no secret that many capable and successful individuals are reluctant to serve as directors or officers of publicly-held corporations and financial institutions because of the fear that they will be subjected to lawsuits. To encourage such individuals to serve as directors, many states have enacted statutes providing that directors of publicly-held corporations shall be defended and indemnified if suits are brought against them for negligence or breach of fiduciary duty in their capacity as directors or officers. *See, e.g.*, 8 Del. C. § 145 (1992); *Merritt-Chapman & Scott Corp. v. Wolfson*, 264 A.2d 358, 360 (Del. Super. 1970) ("Indemnification statutes were enacted in Delaware, and elsewhere, to induce capable and responsible businessmen to accept positions in corporate management"). Many corporations satisfy this obligation by purchasing policies of directors and officers liability insurance. Such insurance provides the directors and officers with the assurance that should the corporation or financial institution fail—an occurrence which will be followed by suits against the directors and officers as surely as night follows day—they will be protected against actions brought on behalf of the creditors and shareholders.

The decisions below, in removing the protection of such insurance at the very moment when it is of the greatest value, cannot help but to discourage individuals from serving as

directors or officers of publicly-traded companies, a result contrary to the public policies of the several States.

B. The Decision Below Allows The Insurer To Avoid A Risk Which It Had Contractually Agreed To Assume.

Here, Reliance expressly assumed the risk of defending and indemnifying the directors and officers from claims brought against them for alleged misconduct and negligence. As a result of the decision below, Reliance has been released from this risk. This is an unjustifiable windfall for the insurer.

The filing of a bankruptcy petition is intended to protect the debtor and its creditors. The debtor is protected from collection efforts. The creditors are protected through the collection, preservation, and distribution of the debtor's property. The filing of a bankruptcy petition is not intended to protect insurance companies who have entered into insurance contracts with the debtor—and, in this case, with the former officers.[8] "The 'fresh-start' policy is not intended to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured. Such a result would be fundamentally wrong." *Houston v. Edgeworth,* 993 F.2d 51, 54 (5th Cir. 1993) (citations omitted) (provider of medical malpractice insurance not released from coverage by bankruptcy and discharge of insured physician). Here, the Policy at issue specifically stated that the bankruptcy of BBC, "shall not relieve the Insurer of any of its obligations hereunder." App. 4a. The decision below, contrary to the Policy and contrary to bankruptcy law, relieved Reliance of all of its obligations under the Policy because of BBC's bankruptcy.

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[8] *See* App. 2a. While the Policy belongs to the estate, the proceeds of the Policy belong to the covered directors and officers. *Louisiana World Exposition, Inc. v. Federal Insurance Co.,* 832 F.2d 1391, 1399-1401 (5th Cir. 1987).

CONCLUSION

The petition for a writ of *certiorari* should be granted for this Court's plenary review.

Respectfully submitted,

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December 22, 1993.

APPENDIX

A. THE INSURANCE POLICY 2a

B. THE BANKRUPTCY PLAN 5a

C. THE DISTRICT COURT OPINION 7a

D. THE COURT OF APPEALS DECISION 23a

A. THE INSURANCE POLICY

DECLARATIONS

Item A Name of Insured ...

BANK BUILDING & EQUIPMENT CORPORATION OF AMERICA ...

Item C Limit of Liability $5,000,000.00 aggregate each policy year, including claim expense ...

Item E One Year Premium $40,000.00 ...

This declaration page (together with the completed and signed proposal form) and the Directors and Officers Liability Policy shall constitute the Contract between (1) the Directors and Officers and the Company and (2) the Insurer.

...

DIRECTORS AND OFFICERS LIABILITY POLICY INCLUDING COMPANY REIMBURSEMENT

In consideration of the payment of the premium ... and subject to all the terms, conditions, limitations and any endorsements to this policy, the Insurer agrees as follows:

I. INSURING AGREEMENTS

A. Directors and Officers Liability

The Insurer will pay on behalf of the Directors and Officers all loss which the Directors and Officers or any of them shall become legally obligated to pay as a result of any claim or claims first made during the policy period against the Directors and Officers, individually or collectively, for a Wrongful Act.

If the Company is permitted or required by law to ultimately indemnify a Director or Officer, or to advance costs and/or defense expenses on their behalf, and does not in fact do so other than for reason of the Financial Insolvency of the Company, then the Insurer shall pay all loss on behalf

of the Director or Officer, subject to the third listed deductible amount set forth in Item D, Retention, of the Declarations and all provisions, terms and conditions of this policy.

B. Company Reimbursement

The insurer will pay on behalf of the Company all loss for which the Company is required to indemnify or for which the Company has, to the extent permitted by law, indemnified the Directors and Officers, for any loss resulting from any claim or claims first made during the policy period against the Directors and Officers, individually or collectively, for a Wrongful Act.

II. EXTENSIONS

A. This policy shall cover loss arising from any claims made against ... the legal representatives or assigns of Directors or Officers in the event of their incompetency, insolvency or bankruptcy. ...

IV. DEFINITIONS

A. The term "Company" shall mean the Company shown in Item A of the Declarations and any subsidiary or subsidiaries as hereinafter defined.

B. "Directors and Officers" shall mean all persons who were, now are, or shall be duly elected Directors or duly elected or appointed Officers of the Company holding any of the officer positions created by the charter or bylaws of the Company ...

C. "Wrongful Act" shall mean any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by the Directors and Officers in the discharge of their duties, individually or collectively, or any matter claimed against them solely by reason of their being Directors or Officers of the Company.

The Wrongful Act of any Director or Officer shall not be imputed to any other Directors or Officers for the purpose of determining the applicability of the Exclusions enumerated in Section V—Exclusions.

D. "Loss" shall mean any amount which the Directors and Officers are legally obligated to pay ... for a claim or claims made against the Directors and Officers for Wrongful Acts ....

"Financial Insolvency" means the status of the Company as a debtor as that term is defined and used within the provisions of Title 11, United States Code, Bankruptcy.

V. EXCLUSIONS

The Insurer shall not be liable to make any payment for loss in connection with any claim made against the Directors or Officers: ...

(J) by or on behalf of a Director and/or Officer, or by or on behalf of the "Company", except for stockholder(s) derivative actions brought by a shareholder(s) of the Company other than a Director and/or Officer. ...

VIII. GENERAL CONDITIONS ...

C. Action Against Insurer ...

Bankruptcy or insolvency of a Director or Officer or of a Director's or Officer's estate or of the Company shall not relieve the Insurer of any of its obligations hereunder. ...

F. Company Authorization

By acceptance of this policy, the Company named in Item A of the Declarations agrees to act on behalf of all Directors and Officers with respect to the giving and receiving of notice of claim ... and the Directors and Officers agree that the Company shall act on their behalf.

B. THE BANKRUPTCY PLAN

1.31 **Plan Committee** shall mean the Committee of three individual creditor representatives, selected on behalf of BBC by the BBC Unsecured Creditors Committee appointed in BBC's case pursuant to 11 U.S.C. § 1102(a)(1), and on behalf of [the two subsidiaries] by each Debtor from its solicitation of its list of twenty largest unsecured creditors, excluding those which have a conflict of interest, which Plan Committee shall function as of and after the Confirmation Date. ...

1.20 **Liquidation and Distribution Agent** shall mean the individual appointed by the Plan Committee, who shall on the Confirmation Date be vested with authority to administer all the property of the Consolidated Debtors and their estate including causes of action ... in accordance with the Plan and under the supervision and direction of the Plan Committee. ...

12.1 This Plan contemplates the liquidation of all the property of the Consolidated Debtors ... and the prosecution of any and all claims or causes of action held by the estates of the Consolidated Debtors by the Plan Committee, through the Liquidation and Distribution Agent on behalf of the estates ....

14.7 Each member of the Plan Committee shall act in a fiduciary capacity for the interests of all Creditors and holders of issued and outstanding shares of common or preferred stock of the Consolidated Debtors ....

18.1 The Bankruptcy Court shall retain jurisdiction of this case pursuant to the provisions of Chapter 11 of the Bankruptcy Code until the entry of a final decree closing all three of the estates of the Consolidated Debtors, and with respect to the following matters:

(a) to preserve for and enable the Plan Committee and the Liquidation and Distribution Agent, for and on behalf of the estates, to consummate any and all proceedings which it

has brought or to commence any action ... to determine the extent that the Directors and Officers Liability Policy of Insurance provides coverage for the acts or omissions of the officers and former officers of BBC, and to recover any ... damages to which the estates of the Consolidated Debtors may be entitled under applicable provisions of the Bankruptcy Code, including without limitation Sections 544, 545, 547, 548, 549 and 553(b), or other federal, state or local laws ....

C. THE DISTRICT COURT OPINION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

RELIANCE INSURANCE CO. OF ILLINOIS,

Plaintiff,

vs.

CARL J. WEIS, *et al.*,

Defendants.

No. 4:92CV296SNL

MEMORANDUM

Plaintiff has filed this declaratory judgment action seeking a declaration of its rights and obligations pertaining to a directors' and officers' liability policy it issued to a presently liquidated bankrupt corporation. Specifically, it seeks a declaration that the said policy does not provide coverage, pursuant to Endorsement 1 of the policy, for claims brought by the Plan Committee representative Miller against certain former officers of the bankrupt corporation (defendants Weis, Clements, and Carpenter). This matter is before the Court on the parties' cross-motions for summary judgment. Extensive pleadings have been filed in connection with these summary judgment motions.

Courts have repeatedly recognized that summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *New England Mut. Life Ins. Co. v. Null,* 554 F.2d 896, 901 (8th Cir. 1977).

Summary judgment motions, however, "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." *Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Pursuant to Fed.R.Civ.P. 56(c), a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467, 82 S. Ct. 486, 7 L.Ed.2d 458 (1962). The burden is on the moving party. *Mt. Pleasant*, 838 F.2d at 273. After the moving party discharges this burden, the nonmoving party must do more than show that there is some doubt as to the facts. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986).

In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 210 (8th Cir. 1976). With these principles in mind, the Court turns to an examination of the facts.

Plaintiff Reliance Insurance Co. is the insurer and provider of the policy in question to Bank Building and Equipment Corporation (BBC). Defendant BBC is a Delaware corporation (headquartered in St. Louis) now liquidated pursuant to Chapter 11 proceedings. Defendant Clements was President and General Manager of the Loughman Division of BBC and the Loughman Corporation, a wholly-owned subsidiary of BBC. Defendant Weis was the Chief Executive Officer of BBC from 1983 through April 1989. Defendant Carpenter was Chief Financial Officer of BBC from 1983 through December 1989.

On April 30, 1990 BBC filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. On July 22, 1991 a liquidation plan (named the First Amended Joint Plan of Liquidation of BBC and known simply as the "Plan") filed on behalf of BBC and two of its subsidiaries was approved by the Bankruptcy Court in St. Louis. Pursuant to the Plan, the Plan Committee of BBC was formed to implement the Plan. According to the Plan, all causes of action belonging to the bankruptcy estate (of BBC) vest and shall be brought in the name of the Plan Committee. Richard Miller was appointed by the Plan Committee as Liquidation and Distribution Agent to act as the representative of the Plan Committee.

In November 1991, after an investigation initiated by the Plan Committee was concluded, Miller brought suit against defendants Weis, Carpenter, and Clements in the Circuit Court for the County of St. Louis. The suit was filed by the Plan Committee alleging breach of fiduciary duty and negligence in the defendants' management of BBC. The suit seeks recovery, for the estate of BBC, of over $50,000,000.00 in actual and punitive damages.

Notice of the civil action was given to Reliance, which had issued a directors and officers' liability policy to BBC. The defendants requested coverage for themselves with

regard to the state court action. Reliance denied coverage for the state court action (hereinafter referred to as Plan Committee action) pursuant to Endorsement 1 of the policy. The pertinent portions of the policy read as follows:

> The insurer will pay on behalf of the Directors and Officers all loss which the Directors and Officers or any of them shall become legally obligated to pay as a result of any claim or claims first made during the policy period against the Directors and Officers, individually or collectively, for a Wrongful Act. (§ IA)
>
> Wrongful Act is defined as: any actual or alleged ... neglect or breach of duty by the Directors and Officers in the discharge of their duties, individually or collectively, or any matter claimed against them solely by reason of their being Directors or Officers of the Company. (§ IVC)
>
> It is agreed that Section V "EXCLUSIONS" shall be amended by the following:
> (the Insurer shall not be liable to make any payment for loss in connection with any claim made against the Directors and Officers:)
> by or on behalf of a Director and/or Officer or by or on behalf of the Company, except for stockholder(s) derivative actions brought by a shareholder(s) of the Company other than a Director and/or Officer. (§ V and Endorsement 1)
>
> "Company" is defined in the policy as "the Company shown in Item A of the Declarations and any subsidiary or subsidiaries as hereinafter defined." (§ IVA) (BBC is the only "company" named in Item A.)

Plaintiff Reliance claims that under Endorsement 1 (an exclusion clause commonly referred to as an "insured v. insured" exclusion clause), plaintiff is not liable for payment of any losses in connection with any claim made against any Director or Officer brought *by or on behalf of the Company.* Plaintiff contends that the Plan Committee is asserting claims on behalf of BBC against defendants Weis, Carpenter, and Clements. Consequently, plaintiff argues that the Plan Committee action falls within the "insured v. insured" exclusion clause of Endorsement 1. Defendants provide three (3) theories as to why Endorsement 1 is not applicable. They argue 1) the exclusion clause is ambiguous, therefore it must be construed in favor of the insured (and not the insurer plaintiff); 2) the Plan Committee action is not brought on behalf of BBC, but rather brought by Miller, as agent for the Plan Committee, on behalf of the bankruptcy estate of BBC (a separate legal entity); and 3) the Plan Committee action is in reality a shareholders derivative action and therefore not within the exclusion of Endorsement 1.

Before embarking on a somewhat difficult road to finding an answer to the issues raised by the summary judgment motions, the Court must first address the preliminary jurisdictional issue of what law controls. This case presents itself with two levels of analysis. On one level, this is a case about interpreting a clause in an insurance contract; consequently state law will control, but which state? Secondly, interpretation of the clause in question involves application of bankruptcy law since the insured has been liquidated under Chapter 11 of the United States Bankruptcy Code and its affairs are being managed under Chapter 7 of the Code.

The plaintiff agrees to application of Delaware law for purposes of the motions. Defendant Carpenter agrees also to application of Delaware law. Defendant Weis appears to be noncommittal as to which state law he favors. Both Missouri and Delaware apply the "most significant relationship" test of Section 145 of the *Restatement (Second) of Conflicts*

(1971) to resolve conflict of laws issues regarding the interpretation and validity of contracts. *Empire Petroleum v. D.F. & Associates. Inc.*, 538 F. Supp. 615, 619 (E.D. Mo. 1982); *The Travelers Indemnity Co. v. Ben E. Lake, et. al.*, 594 A.2d. 38 (Del. 1991).

However, in the present case, the insurance policy in question clearly states that Delaware law shall control in cases regarding interpretation and application of the policy. Section VI, subsection J. The federal rule on the enforcability of forum selection clauses requires that the clause should control and be enforced unless it can be shown that the clause is unreasonable and unjust, or that the clause is invalid because of fraud or overreaching, or that the suit is broader than the intended scope of the clause. *See, Carnival Cruise Lines, Inc. v. Shute,* 111 S. Ct. 1522 (1991); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Medicine Shoppe International v. Browne,* 683 F. Supp. 731, 733 (E.D.Mo. 1988). None of the defendants have raised any one of these contentions and the Court finds that none are applicable here, therefore this Court elects to apply Delaware law as to the interpretation and validity of the insurance policy at issue, especially with regard to Endorsement 1.

Under Delaware law, plaintiff Reliance has the burden of proving that Endorsement 1 applies in the present situation in order to avoid coverage. *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d. 1162, 1163 (3rd. Cir. 1991) (commonly referred to as *New Castle V*).

Generally, an insurance contract or policy is construed strongly against the insurer and in favor of the insured, unless there is some ambiguity in the policy language. *New Castle County v. Hartford Accident & Indemnity Co.*, 970 F.2d. 1267, 1270 (3rd. Cir. 1992) (commonly referred to as *New Castle VII*); *Aetna Casualty & Suretv v. Kenner,* 570 A.2d. 1172, 1174 (Del. 1990); *Hallowell v. State Farm*

Mutual, 443 A.2d. 925, 926 (Del. 1982); *Grissom v. Nationwide Mutual Ins.,* 599 A.2d. 1086, 1088 (Del.Ch. 1991). When the language of an insurance policy is clear and unequivocal, the parties will be bound by its clear meaning. A Delaware court will not construe or twist the words in order to create an obligation which does not exist or to which the parties had not assented. *Kenner,* at 1174; *Hallowell,* at 926; *Grissom,* at 1088. However, if ambiguity does exist, it must be construed against the drafter of the policy, i.e. the insurer. *Hallowell,* at 926; *Grissom,* at 1088.

Simply because the parties may suggest alternative interpretations of particular contract language, does not automatically establish an ambiguity. An ambiguity exists only when the contract language is subject to two or more reasonable interpretations. *New Castle VII,* at 1270; *Kenner,* at 1174; *Hallowell,* at 926; *Grissom,* at 1088. "Because ambiguity lurks in every word, sentence, and paragraph in the eyes of a skilled advocate, absent a showing that the term has acquired a special meaning the question is not whether there is an ambiguity in the metaphysical sense, but whether the language has only one reasonable meaning when construed, not in a hypertechnical fashion, but in an ordinary, common sense manner." *New Castle VII,* at 1270; *see also, New Castle V,* 933 F.2d. at 1188; 2 Couch, Couch on Insurance 2d., § 15:17 at 177-78, 190 (Rhodes rev. ed. 1984). All relevant provisions of the insurance policy must be examined and read in concert, rather than a single passage in isolation. *Kenner,* at 1174; *Grissom,* at 1088.

In the instant matter, the parties disagree as to the interpretation and intent of the language contained in Endorsement 1 of the policy. In particular, the parties dispute the meaning of the phrase "by or on behalf of the Company". The parties agree that the Company is BBC; they also agree that the Plan Committee action was not brought "by the Company" since BBC has been liquidated; what they don't

agree on is whether the Plan Committee action was brought "on behalf of the Company".

This issue is complicated by the fact that BBC was liquidated in accordance with Chapter 11 of the United States Bankruptcy Code and its affairs are now being managed in accordance with Chapter 7 of the Code. The phrase "on behalf of the Company" takes on special meaning due to the bankruptcy. It is this Court's considered opinion that in order to assess whether or not ambiguity exists with regard to Endorsement 1, the phrase in question must be construed within the realm of bankruptcy law.

The Court has carefully reviewed the case law cited by the parties. Unfortunately, these cases are not extremely helpful in providing guidance to the Court. The majority of cases cited deal with exclusion clauses similar to the present one, however, the interpretation and application of the clause is limited to facts involving bank failures. The principles espoused are restricted to the unique situation of the FDIC or the RTC taking control of a failed bank. The present situation deals with a bankrupt corporation no longer physically or legally in existence as it had been before the bankruptcy. The Court is constrained to draw from the basic tenets of insurance law and bankruptcy law in order to resolve this matter.

The parties contend that other provisions in the policy support their respective positions. There are other provisions in the policy that address the parties' rights in the event of the bankruptcy of BBC. Section VIII(c) provides that plaintiff Reliance's coverage shall continue unabated in the event of BBC's bankruptcy. Endorsement 4 states that the applicable officer and director retention (under Item D) shall be reduced from $150,000.00 to $2,500.00 if the insured company (BBC) becomes a debtor under Chapter 11 of the Bankruptcy Code and is unable to reimburse its officers for any liability covered by the policy. The parties argue that the existence of these other "bankruptcy" provisions in the policy are

significant to the Court's interpretation and application of Endorsement 1. Plaintiff Reliance contends that since the parties' rights in the event of bankruptcy are expressly addressed under different provisions of the policy, if Endorsement 1 was also intended to address the parties' rights in the event of bankruptcy, i.e. that Endorsement 1 was not applicable, Reliance would have said so in the clause. Consequently, Endorsement 1 is applicable in the present case. The defendants, on the other hand, argue that Reliance could have expressly excluded claims by the bankruptcy estate of BBC but elected not to do so. They contend that since the policy does refer to parties' rights in the event of bankruptcy elsewhere, the failure to address the issue in Endorsement 1 or in the definition of "Company" demonstrates Reliance's intent not to include actions by the bankruptcy estate in Endorsement 1, i.e. Endorsement 1 not applicable in the present case.

Both sides present very plausible arguments to the Court. However, the Court believes that since Reliance is the drafter of the policy and did address the issue of bankruptcy elsewhere in the policy, then it appears reasonable to conclude that if Reliance had wanted to expressly address the issue of bankruptcy in Endorsement 1, it would have done so. This is simply an observation of the Court to be considered in making its ultimate decision in this matter.

As stated before, the issue central to this case is what is meant, under bankruptcy law, by the phrase "on behalf of the Company". Plaintiff Reliance argues that liquidated BBC is now nothing more than a "bankruptcy estate" and as such encompasses all legal and equitable interests and property held by BBC as of the date of filing the bankruptcy petition. Reliance further argues that the Plan Committee, as representative of the bankruptcy estate, can only bring claims belonging to BBC, thus the state civil action is "on behalf of the Company" and is excluded from coverage pursuant to Endorsement 1. Defendants, on the other hand, argue that the

filing of a bankruptcy petition divests the debtor of all rights in the property of the estate and vests all such rights in the trustee. They further argue that the trustee is a newly created juridical entity with his/her/its own rights and duties and subject to the control of the bankruptcy court. The defendants aver that Miller and the Plan Committee, are akin to a trustee, and thus are working not for BBC but rather on behalf of the bankruptcy estate for the sole benefit of the creditors and shareholders of the liquidated BBC.

What is an estate under the bankruptcy laws? What purpose does the Plan Committee serve? The answers to these two questions is paramount to the Court's resolution of the problem before it.

The bankruptcy estate is created upon the filing of the petition for bankruptcy; as in this case pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et. seq.* Section 541 of the Code establishes that the filing of the bankruptcy petition creates an estate and defines which property comprises the estate. Subsection 541(a)(1) defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." *See, In re Ozark Restaurant Equipment Co., Inc.,* 816 F.2d. 1222, 1224-25 (8th Cir. 1987). This includes all choses in action and claims by the debtor against others. It is significant that the definition of the estate enbraces causes of action belonging to the *debtor* at the time of the commencement of the action. *Ozark Restaurant,* at 1225. Thus, under the provisions of Section 541, the estate succeeds to any right of action a debtor corporation may have to recover damages for misconduct, mismanagement, or neglect of duty by a corporate officer or director, and the trustee has the authority to bring such actions on behalf of the debtor corporation. *Ozark Restaurant,* at 1225. However, a trustee (or as in this case, a liquidation and distribution agent), stands in the shoes of the debtor corporation in prosecuting a cause of action belonging to the debtor, and where the applicable state law makes such

obligations or liabilities run to the corporate creditors personally, rather than to the corporation, such rights of action are not assets of the estate pursuant to Section 541(a) that are enforcable by the trustee or liquidation agent. *See,* 4 Collier on Bankruptcy, § 541.10[8] (15th ed. 1986).

As regards insurance policies, directors' and officers' liability (D&O) policies or otherwise, some courts have found that the policies are part of the estate, although the proceeds may not be. *In Re Daisy Systems Securities Litigation,* 132 B.R. 752 (9th Cir. 1991); *In Re Louisiana World Exposition,* 832 F.2d. 1391 (5th Cir. 1987); *In Re Minoco Group of Companies, Ltd.,* 799 F.2d. 517 (9th Cir. 1986). In *Louisiana World Exposition,* the Fifth Circuit took pains to point out an important factual and procedural distinction among suits where the directors' and officers' liability coverage was at issue. It noted that "[h]ere, the suit calling the liability coverage into play is one brought by the Committee on behalf of the debtor, LWE. The object of that action is to enlarge the debtor's estate." *Id.,* at 1400. The Court noted that this distinguished its case from other cases in which plaintiffs were not suing for the debtor's benefit but rather for their own personal benefit. *Id.,* at 1400.

In the present case, there is no dispute that BBC had a right of action, such as the pending state Plan Committee action, at the time of the filing of its bankruptcy petition. Under the Code, this right of action became part of the bankruptcy estate. Furthermore, none of the parties have cited any Delaware caselaw which makes an action, such as the pending state Plan Committee action, personal to the corporate creditors rather than the corporation itself. The claims asserted in the Plan Committee action could have been brought by BBC and although they were not, "the estate's legal and equitable interests in property rise no higher than those of the debtor." *In Re Louisiana World Exposition,* at 1399, citing *In re Gagnon,* 26 B.R. 926, 928 (Bankr.M.D.Pa. 1983). It is clear that whenever a cause of action "belongs"

to the debtor corporation, the trustee, or in this case, the liquidation and distribution agent, simply has the authority to pursue that cause of action. *See, Ozark Restaurant,* at 1225.

This brings us to the second question as to the role that the Plan Committee (and to a smaller degree, the liquidation and distribution agent Miller) plays in BBC's bankruptcy. The answer to this inquiry lies in the terms of the Liquidation Plan and the Disclosure Statement filed in BBC's bankruptcy case.

In the First Amended Joint Plan of Liquidation of BBC, confirmed by the Bankruptcy Court in July 1991, the Liquidation and Distribution Agent and the Plan Committee are defined as follows:

> 1.20 **Liquidation and Distribution Agent** shall mean the individual appointed by the Plan Committee, who shall on the Confirmation Date be vested with authority to administer all the property of the Consolidated Debtors and their estate including causes of action and all proceeds from the liquidation of such property and who shall have the right and duty to receive, reinvest, and distribute all such property in accordance with the Plan and under the supervision and direction of the Plan Committee.
>
> 1.31 **Plan Committee** shall mean the Committee of three individual creditor representatives, selected on behalf of BBC by the BBC Unsecured Creditors Committee appointed in BBC's case pursuant to 11 U.S.C. § 1102(a)(1), and on behalf of MBI and API by each Debtor from its solicitation of its list of twenty largest unsecured creditors, excluding those which have a conflict of interest, which Plan

> Committee shall function as of and after the Confirmation Date.

BBC Liquidation Plan, Article I. Under Article XII of the Liquidation Plan (**Means For Execution of the Plan**), the Plan contemplates not only liquidation but also "the prosecution of any and all claims or causes of action held by the estates of the Consolidated Debtors by the Plan Committee ...". Article XII, Subsection 12.1. Article XII goes on to discuss the appointment of the Liquidation and Distribution Agent and states that "[o]nce appointed, the Plan Committee, by the Liquidation and Distribution Agent shall be responsible for prosecuting and defending any and all claims and causes of action relating to the Consolidated Debtors' estate, including, without limitation (1) claims of each estate against any Person (including, without limitation, any claims or causes of action arising under Sections 544, 545, 547, 548, 549, and 553(b) of the Bankruptcy Code) ...". Article XII, Subsection 12.3.

Article XIV of the Liquidation Plan describes the Plan Committee in detail and outlines its duties and responsibilities. Subsection 14.1 stipulates that the Plan Committee shall have the same authority to act for the Consolidated Debtors as a board of directors for each of the Consolidated Debtors. It goes on to state that following confirmation, "all causes of action belonging to any of the Consolidated Debtors shall vest and be brought in the name of the Plan Committee, on behalf of the particular Consolidated Debtor or Debtors in which the cause of action had been previously vested." With regards to the creditors and shareholders, Subsection 14.7 states that the Plan Committee "shall act in a fiduciary capacity ...".

Finally, Article XVIII discusses retention of jurisdiction by the Bankruptcy Court. Subsection 18.1(a) states that the Bankruptcy Court shall retain jurisdiction in order for and to enable "the Plan Committee and the Liquidation and

Distribution Agent, for and on behalf of the estate to ... determine the extent that the Directors and Officers Liability Policy of Insurance provides coverage for the acts or omissions of the officers and former officers of BBC, and to recover any preferences, transfers, assets or damages to which the estates of the Consolidated Debtors may be entitled ...".

The First Amended Disclosure Statement (filed in conjunction with the Liquidation Plan) addresses the purpose and goals of the Plan Committee and the Liquidation Plan.

In Section VI. **PLAN COMMITTEE**, the Disclosure Statement notes that "[b]ecause the Plan Committee will consist of creditors of BBC, API, and MBI, it will be able to provide broad based representation for the Consolidated Debtors."

In Section VII. **THE PLAN OF LIQUIDATION**, the Disclosure Statement points out that once the business affairs of the Consolidate Debtors is liquidated, "the only continuing affairs of the Consolidated Debtors will be the pursuit of additional recoveries through legal actions that are pending or instituted in accordance with the Plan." The Consolidated Debtors affairs are to be monitored and supervised by the Plan Committee. The Agent is authorized to take whatever legal actions are necessary "in the name of and on behalf of the Consolidated Debtors." The Plan is to operate like a Chapter 7 liquidation under the Bankruptcy Code and the "duties of the Chapter 7 Trustee are executed by the Plan Committee and the Agent." Finally, the "overriding goal and purpose of this Plan is speedy, efficient and economical liquidation of the Consolidated Debtors and the distribution of all available funds to creditors."

It is this Court's considered opinion that pursuant to the Bankruptcy Code, the Liquidation Plan, the Disclosure Statement, and the relevant caselaw, whatever right of action BBC had against its former officers for mismanagement and

breach of fiduciary duty was transferred to the bankruptcy estate upon the filing of its bankruptcy petition. Once BBC was liquidated, Agent Miller and the Plan Committee were obligated to pursue BBC's right of action in order to recover assets for BBC's estate. The purpose of the pending state court action is to recover all available funds for distribution to BBC's creditors. It is clear that the pending state court action was filed on behalf of BBC and its estate, although the benefits sought may eventually inure to the creditors. For purposes of this litigation, there is no significant legal distinction between BBC and its bankruptcy estate.

With regard to the defendants' assertion that the pending state court action is in reality a shareholder's derivative action, the Court finds this contention meritless. None of the prerequisites, under Delaware law, for filing a shareholder's derivative action have been met. *See,* Chancery Court Rule 23.1, DEL. CODE ANN.; Delaware Corporation Law Annotated, § 327. Nowhere in the state court complaint is it stated that the claims are derivatively asserted on behalf of BBC's shareholders. The Court finds that the pending state court action is not a shareholder's derivative lawsuit.

The Court concludes that the pending state court action was filed by Agent Miller and the Plan Committee on behalf of BBC and its estate against defendants Weis, Carpenter, and Clement for mismanagement and breach of fiduciary duties. It seeks over 50,000,000.00 in actual and punitive damages. Any award of damages would go into the estate for future distribution to creditors.

There is no ambiguity in the language contained in Endorsement 1. Any lawsuit brought on behalf of BBC against its former officers falls within this exclusion clause. Such a lawsuit is presently pending in the Circuit Court for the County of St. Louis; therefore, Endorsement 1 is applicable. Coverage for defendants Weis, Carpenter, and Clements is excludable under the policy.

Summary judgment will be granted for plaintiff Reliance and against defendants Agent Miller, Plan Committee, Weis, Clements, and Carpenter on the merits of plaintiff's declaratory judgment complaint.

Dated this 18th day of December, 1992.

/s/ Stephen N. Limbaugh

UNITED STATES DISTRICT JUDGE

D. THE COURT OF APPEALS DECISION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Reliance Insurance Company of Illinois, Plaintiff-Appellee, vs. Plan Committee of Bank Building and Equipment Corporation of America, In Liquidation, Defendant-Appellant.	Appeal No. 93-1259EMSL
Reliance Insurance Company of Illinois, Plaintiff-Appellee, vs. Carl J. Weis, Jr., Defendant-Appellant.	Appeal No. 93-1260EMSL

Appeal from the United States District Court
for the Eastern District of Missouri.

[UNPUBLISHED]

Submitted: September 13, 1993
Filed: September 23, 1993

Before HANSEN, Circuit Judge, LAY and BRIGHT, Senior Circuit Judges.

PER CURIAM.

In case No. 93-1259 involving the appeal by the Plan Committee of Bank Building and Equipment Corporation of America, In Liquidation, the judgment of the district court is affirmed on the basis of the well-reasoned opinion of the district court.

In case No. 93-1260, on the basis of the affirmance of the summary judgment entered in case No. 93-1259, the judgment of dismissal of the counterclaim of Carl J. Weis, Jr. for breach of contract is likewise affirmed.

See 8th Cir. R. 47B.

A true copy.

Attest:

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U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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No. 93-1028

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BANKRUPTCY PLAN COMMITTEE OF THE BANK BUILDING & EQUIPMENT CORP. OF AMERICA, IN LIQUIDATION,

Petitioner,

vs.

RELIANCE INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT RELIANCE INSURANCE CO., IN OPPOSITION

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QUESTIONS PRESENTED

1. Where the court appointed bankruptcy representative asserts breach of fiduciary duty claims of the bankrupt company against the company's former officers, seeking to recover damages sustained by the company due to the officers' breach of duties to the company, under Delaware law does a directors and officers liability insurance policy excluding claims by or on behalf of the company against such officers preclude coverage for that lawsuit?

2. Where the Bankruptcy Code vests a bankruptcy representative with the exclusive right to pursue claims on behalf of the company, and the representative brings suit on such a claim against the company's officers without referring to the company's shareholders or satisfying any of the pre-requisites for a shareholders' derivative suit, under Delaware law is that action a shareholders' derivative suit that fits within an exception for such actions in an exclusion in a director and officers liability insurance policy that excludes claims by or on behalf of the company against its officers?

PARTIES TO THESE PROCEEDINGS

Petitioner is the Plan Committee of Bank Building and Equipment Corporation of America, In Liquidation.

Myron Carpenter, Douglas Clements and The Boatmen's National Bank of St. Louis are not parties to the proceeding in the court whose judgment is sought to be reviewed by this Court.

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No. 93-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BANKRUPTCY PLAN COMMITTEE OF THE BANK BUILDING & EQUIPMENT CORP. OF AMERICA, IN LIQUIDATION,

Petitioner,

vs.

RELIANCE INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT RELIANCE INSURANCE CO., IN OPPOSITION

OPINION BELOW

The decision of the Court of Appeals for the Eighth Circuit, *Reliance Insurance Co. v. Weis, et al.*, 5 F.3d 532 (8th Cir. 1993), affirmed the District Court's finding, *Reliance Insurance Co. v. Weis, et al.*, 148 B.R. 575 (E.D. Mo. 1992), that the petitioner's action was brought "on behalf of" the bankrupt company against its own officers and that such claims were excluded from coverage by the "insured v. insured" provision of the directors

and officers liability insurance policy issued to the company by the respondent. The decisions of the Court of Appeals and the District Court are reproduced in the petitioner's appendix at P. App. 23a-24a and P. App. 7a-22a,[1] respectively.

JURISDICTION

The respondent adopts by reference the petitioner's statement of jurisdiction.

STATUTES INVOLVED

The respondent adopts by reference the petitioner's statement of the statutes involved in this proceeding.

STATEMENT OF THE CASE

The petitioner, the Bankruptcy Plan Committee (the "Plan Committee"), was established and authorized to act on behalf of the bankrupt Bank Building & Equipment Corporation of America ("BBC") in accordance with BBC Plan of Liquidation (the "Plan"), as approved by the bankruptcy court. The Plan specifically states that the Plan Committee was created to act *on behalf of BBC* and its estate. (Relevant portions of the Plan are reproduced in the appendix[2] to this brief.)

The Plan Committee's authority is governed by the U.S. Bankruptcy Code, 11 U.S.C. § 541(a)(1), which states that a bankruptcy estate is comprised of "all legal or equitable interests of the debtor," i.e. BBC. The Plan Committee's and the estate's rights are derived exclusively from BBC; they do not acquire or possess any other rights. The Plan Committee cannot, as suggested by the petitioner, pursue claims emanating from third parties such as BBC's creditors.

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[1] Reference to the Appendix of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, shall be made as (P. App. _____ a).

[2] References to the Respondent's Appendix to this brief shall be made as (Resp. App. _____).

The lower courts resolved a simple, straightforward question: Under Delaware law, is the action commenced by the Plan Committee against BBC's former officers excluded from coverage under the directors and officers liability insurance policy issued to BBC by the respondent, the Reliance Insurance Company (hereinafter "Reliance"), pursuant to the provision that excludes claims by or on behalf of the Company? Both the District Court and the Court of Appeals applied Delaware law, the law that governs the interpretation of the Reliance policy, found the exclusion applied, and granted judgment to Reliance.

The Plan Committee is an entity created solely as a result of BBC's bankruptcy, with only those powers and authority prescribed in the Plan and the U.S. Bankruptcy Code. The Plan itself states that the Plan Committee was selected to act on behalf of BBC, with the authority to assert claims *on BBC's behalf*. Section 1.31 of the Plan unequivocally states that the Plan Committee was appointed on behalf of BBC:

> The Plan Committee shall mean the Committee of three individual representatives, *selected on behalf of BBC* by BBC's unsecured creditors committee appointed in BBC's case pursuant to 11 U.S.C. § 1102(a)(1). . .

P. App. 5a, (Emphasis added.)

In addition, Article XII, Section 12.1 of the Plan authorizes the Plan Committee to prosecute the claims held by BBC's estate:

> This Plan contemplates the liquidation of all of the property of the Consolidated Debtors. . . and *the prosecution of any all claims or causes of action held by the estates of the Consolidated Debtors* by the Plan Committee. . . *on behalf of the Estate* prior to and after the Effective Date to the extent that the Plan Committee believes such prosecution to be feasible and warranted.

Resp. App. B-1, (Emphasis added.)

The Plan, Article I, Section 1.12, identifies BBC as one of the consolidated debtors:

> Consolidated Debtors shall mean the procedurally combined estates of *In re Bank Building and Equipment Corporation of America*, . . . *In re BBC Manufactured Buildings, Inc.*, . . . and *In re Accesseron Products, Inc.* . . .

Resp. App. B-1.

Similarly, Article XII, Section 12.3 of the Plan, provides that the Plan Committee " . . . shall be responsible for prosecuting and defending any and all claims relating to the Consolidated Debtors' estate. . ." Resp. App. B-1. Accordingly, the Plan Committee was authorized to pursue BBC's rights and claims, including BBC's claim against its officers for their breach of fiduciary duties and BBC's corresponding losses and damages.

Other provisions of the Plan confer upon the Plan Committee the authority to act as BBC's board of directors and pursue claims belonging to BBC, and describe the procedures to be followed by the Plan Committee. Article XIV, section 14.1 states:

> . . . The Plan Committee shall have the same authority to act for the Consolidated Debtors as a board of directors for each of the Consolidated Debtors . . . Upon confirmation, all causes of action belonging to any of the Consolidated Debtors shall vest and be brought in the name of the Plan Committee, on behalf of the particular Consolidated Debtor or Debtors in which the cause of action had been previously vested.

Resp. App. B-1, B-2.

A Disclosure Statement was also filed in BBC's bankruptcy proceedings, to obtain approval of the objectives of the Plan from BBC's creditors and other interested parties. Relevant portions of the Disclosure Statement are reproduced in the appendix to this brief. Under the "First Amended Disclosure Statement Filed

in Connection with the [Plan]" (hereinafter "the Disclosure Statement"), Article VII, section (C)6, provides that BBC's "Plan Committee . . . shall have the right to bring all actions and proceedings belonging to the Consolidated Debtors or their Estates. . ." Resp. App. C-1.

Article V of the Disclosure Statement, entitled "Ongoing Liquidation Efforts," identifies the very claim against BBC's former officers which became the subject of the Plan Committee Action and the instant declaratory judgment action:

> One of the potential causes of action is a claim *by BBC* against certain of its former officers . . . arising out of the alleged failure and fraud by Loughman Division officers and employees at the Loughman Division of BBC. The alleged misconduct of management of the Loughman Division and the potential causes of action are set forth in the report of the Court appointed Examiner, . . .
>
> * * *
>
> . . . Proponents expect the Plan Committee to employ special counsel to review the findings of the Examiner's report in order to determine in greater detail the possible legal actions available against certain officers of BBC, . . . and to assess and calculate any damages and to pursue any appropriate action *on behalf of BBC*.

Resp. App. C-1, (Emphasis added).

Special counsel (the very attorneys who filed this petition) were, in fact, retained by the Plan Committee to review the findings in the bankruptcy examiner's report and prosecute BBC's claim against its officers.

The authority to bring suit on BBC's causes of action was exercised by the Plan Committee in November of 1991, when it brought an action against BBC's former officers entitled *Richard Miller . . . acting in the name of the Plan Committee for the Bankruptcy Estate of Bank Building and Equipment Corp. of America v. Doug Clements, et al.* in the Circuit Court

of the County of St. Louis, State of Missouri (the "Plan Committee Action").

The Complaint in the Plan Committee Action alleged that "pursuant to the Plan, all causes of action belonging to the bankruptcy estate of Bank Building & Equipment Corp. vest and shall be brought in the name of the Plan Committee which has the sole responsibility for implementing the plan." Resp. App. D-2. Relevant portions of the Complaint are reproduced in the appendix to this brief.

The Plan Committee alleged that Doug Clements was an officer of BBC, and ". . . had a fiduciary duty to BBC to act in the best interests of BBC." Resp. App. D-2. Similarly, the complaint asserted that "Weis, as Chief Executive Officer, and Carpenter, as Chief Financial Officer, of BBC owed a duty to BBC to exercise the care that an ordinarily careful and prudent person would use in managing BBC and its subsidiaries and supervising their subordinates." Resp. App. D-2, D-3. The Plan Committee alleged that "Weis and Carpenter breached their duty of care to plaintiffs by negligently and carelessly failing to supervise Clements . . ." Resp. App. D-3. Thus, it was asserted that as a direct result of Clements' conduct, ". . . BBC lost in excess of $8,000,000." Resp. App. D-2. Further, it was alleged that:

> "[a]s a direct result of Weis' and Carpenter's negligence, as aforesaid, BBC lost in excess of $8,000,000. Moreover, as a direct result of their negligence, BBC was unable to survive as a profitable business which reasonably could have been expected to earn profits in excess of $15,000,000."

Resp. App. D-3.

Certain former BBC officers requested that the respondent, Reliance, provide coverage for the Plan Committee Action under the directors and officers liability insurance policy issued by Reliance to BBC.

Reliance, however, denied coverage because the Plan Committee Action was brought against the officers *on behalf of BBC* and asserted claims *on BBC's behalf* arising out of the breach

of fiduciary duties owed *to BBC* by its officers. Reliance's disclaimer was based upon Endorsement No. 1 of the policy, which states:

> The Insurer shall not be liable to make any payment for loss in connection with any claim made against the Directors or Officers: . . . by or on behalf of a director and/or officer or by or on behalf of the "Company", except for stockholder(s) derivative actions brought by a shareholder(s) of the Company other than a Director and/or Officer.

P. App. 4a.

The policy, under Section VI(J), provided that it would be governed by Delaware law:

> This policy, to the extent permitted by applicable law, shall be construed in accordance with the law of the jurisdiction of the incorporation of the Company named in Item A of the Declarations. . .

Resp. App. A-1.

BBC is named in the Declarations and is incorporated in the state of Delaware. Relevant portions of the Declarations are reproduced in the appendix to this brief. Resp. App. A-1. Thus, the policy should be construed in accordance with Delaware law.

It is important to note that under the policy, it was stated that BBC's bankruptcy did not alter the rights and obligations of any party to the insurance contract. Reliance's obligations remain unchanged upon the bankruptcy of any insured, pursuant to Section VIII(C):

> Bankruptcy or insolvency of a Director or Officer or a Director's or Officer's estate or of the Company shall not relieve the Insurer of any its obligations hereunder. . .

P. App. 4a.

Endorsement No. 4 of the policy conferred certain benefits upon the insured officers in the event of BBC's bankruptcy, in that a smaller $2,500 retention would be charged to them if BBC

went bankrupt, rather than the $150,000 company reimbursement which would apply if BBC declined to indemnify the officers for reasons other than bankruptcy. Resp. App. A-1, A-2.

While the policy therefore contains express provisions dealing with an insured's bankruptcy, it is devoid of any indication that Endorsement No. 1 would be eliminated or altered in the event of any such bankruptcy.

Reliance commenced the instant declaratory judgment action, *Reliance Insurance Co. v. Carl Weis, et al.*, 148 B.R. 575, (E.D. Mo. 1992), in the United States District Court for the Eastern District of Missouri, seeking a declaration that it had no obligation to defend or indemnify the former officers of BBC under its directors and officers liability insurance policy. It asserted that the Plan Committee Action was brought on behalf of BBC and thus excluded from coverage by the exclusion in Endorsement No. 1.

Reliance moved for summary judgment arguing that the Plan Committee Action was commenced by or on behalf of BBC, or by the Plan Committee as BBC's representative in bankruptcy "standing in the shoes" of BBC for the purpose of prosecuting all claims by BBC.

The Plan Committee cross-moved for summary judgment urging the Court to find coverage for this claim. It argued that the Plan Committee Action was commenced on behalf of the BBC bankruptcy estate and/or for BBC's creditors. In addition, the Plan Committee argued that because the Plan Committee Action was the equivalent of a shareholders' derivative action, it was not excluded under Endorsement No. 1.

The District Court granted summary judgment in favor of Reliance, finding that the Plan Committee Action was brought "on behalf of BBC" against its own officers and excluded by Endorsement No. 1. That ruling was based upon the Plan and its the provisions authorizing suit against BBC's officers, the Plan Committee's Complaint, the Bankruptcy Code, and the policy.

The District Court stated that under the United States Bankruptcy Code § 541(a)(1), the property of a bankruptcy estate is

defined as "all legal or equitable interests *of the debtor* in property as of the commencement of the case." P. App. 16a. (Emphasis added.) It found that the estate inherited all causes of actions by BBC against others, and that BBC's bankruptcy representative may pursue such claims on behalf of the debtor. The Court stated:

> It is significant that the definition of the estate embraces causes of action belonging to the debtor at the time of the commencement of the action . . . Under Section 541, the estate succeeds to any right of action a debtor corporation may have to recover for damages for misconduct, mismanagement or neglected duty by a corporate officer or a director, and the trustee has the authority to bring such actions on behalf of the debtor corporation.

P. App. 16a.

The District Court also found that a trustee or, in this case, a liquidation and distribution agent, "stands in the shoes of a debtor corporation", P. App. 16a, and can only prosecute causes of action *belonging to the debtor.* It found that the claims in the Plan Committee Action could have been brought by BBC, as "the estate's legal and equitable interest in property rise no higher than those of the debtor". P. App. 17a. The District Court concluded that BBC's right of action against its officers and directors was transferred to its bankruptcy estate upon the filing of the bankruptcy petition and that the Plan Committee had the authority to pursue this action to recover assets for the estate. Thus, it was clear that the Plan Committee Action was filed on behalf of BBC, within the meaning of Endorsement No. 1.

The District Court rejected as "meritless" the Plan Committee's argument that the action was actually a shareholders' derivative action, as none of the prerequisites under Delaware law for such a suit had been met. P. App. 21a.

In an unpublished decision, the United States Court of Appeals for the Eighth Circuit affirmed "on the basis of the well-reasoned opinion of the District Court." P. App. 23a-24a.

REASONS FOR DENYING THE WRIT

The writ should be denied since none of the "special and important reasons" for granting a petition for a writ of certiorari are present. Simply stated, the central issues involve whether a bankruptcy representative of a commercial corporation acts on behalf of the bankrupt company in asserting a breach of fiduciary duty claim against the company's officers and, correspondingly, whether under Delaware law this claim is excluded under a directors and officers liability insurance policy that excludes coverage for claims against such officers "by or on behalf of" the bankrupt company. This case does not involve a controlling question of federal law, but merely focuses on the interpretation of an insurance policy pursuant to state law; there is no conflict between the U.S. circuit courts on this issue; it does not relate to any significant question of public policy; and the lower court correctly ruled in favor or the respondent.

The considerations governing this Court's review of a writ of certiorari are, in part, as follows:

> .1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with a decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure from a lower court, as to call for an exercise of this Court's power of supervision.

U.S. Sup. Ct. Rule 10.1(a), 28 U.S.C.A.

This case does not embrace any of the above considerations. An important question of federal law was *not* decided, as the Court of Appeals affirmed the lower court's interpretation of an insurance policy pursuant to Delaware law. Indeed, the petitioner admits that Delaware law applies. Petitioner's Brief, p. 17, n. 7. Moreover, it is well established that state law controls the interpretation of insurance policies and federal courts sitting in diversity should follow those decisions. Supreme Court review of such issues controlled by state law is unwarranted and unnecessary.

There is no conflict on any pertinent issue in this case between the United States courts of appeals. This is highlighted by the petitioner's brief, which refers only to decisions of the lower federal courts. In fact, the District Court herein essentially found that the decisions cited by the petitioner on similar exclusions in directors and officers policies ("D&O" policies) involved bank failures governed by federal banking laws and interests, rather than commercial bankruptcies affected by such federal concerns. Such decisions were rendered only by federal district courts. In any event, they are not controlling in this case, where there are no federal banking statutes or entities at issue.

To the extent that reference was made to the Bankruptcy Code and caselaw to construe the exclusion, the opinion below is consistent with the longstanding principle that a bankruptcy representative "stands in the shoes" of the bankrupt company under its contracts and insurance policies. There is nothing controversial or earth-shattering about that principle or its application to D&O policies or any other insurance policies or contracts. The decision follows rather than departs from controlling precedent relating to insurance coverage for bankrupt companies, and is consistent with the "accepted and usual course of judicial proceedings."

For the foregoing reasons, this Court should not accept the petitioner's writ.

I. THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS ON THE QUESTIONS PRESENTED

The petitioner erroneously asserts that this Court should exercise its judicial discretion because there is a conflict among the "lower federal courts" on the issues in this case. Petitioner's Brief,

p. 10. This is an utterly inadequate basis for Supreme Court intervention, as only a conflict among United States courts of appeals justifies such a review.

The petitioner has not cited a single case from any jurisdiction, let alone a circuit court of appeals, interpreting the Bankruptcy Code in a way so as to decline, under Delaware or any other state's law, to enforce an insured v. insured exclusion against a claim by a bankruptcy representative of a commercial corporation against its officers. The petitioner only cited district court decisions declining to enforce such exclusions, and then only in the context of bank failure cases governed not by the Bankruptcy Code but by federal banking laws.

In the petition's only reference to a purportedly conflicting circuit court decision, the petitioner asserts that the appeal did not even address the insured v. insured exclusion:

> . . . *FDIC v. Zaborac*, 773 F. Supp. 137, 144 (C.D. Ill. 1991), *aff'd sub nom FDIC v. American Casualty Co. of Pennsylvania*, 998 F.2d 404 (7th Cir. 1993)(*not reaching issue of scope of "insured v. insured exclusion*)."

Petitioner's Brief, p.12. (Emphasis added).

In fact, the Seventh Circuit's opinion in that case tacitly approves the insured vs. insured exclusion:

> . . .[T]he plain language of Endorsement #8 [the insured vs. insured exclusion] of the policy would have excluded from coverage an action by the Bank itself against the directors or officers.

998 F.2d at 408.

There is clearly no conflict among the federal circuits on the pertinent issue, *i.e.*, Delaware's treatment of the insured v. insured exclusion under a contract of D&O insurance in a private commercial bankruptcy.

II. THIS CASE IS BASED UPON THE INTERPRETATION OF AN EXCLUSION IN A DIRECTORS AND OFFICERS LIABILITY INSURANCE POLICY GOVERNED BY DELAWARE LAW

This writ should also be denied since the Court of Appeals did not ultimately decide a controlling question of federal law. It merely affirmed the District Court's interpretation of the Reliance policy under *Delaware law*.

This Court has stated that a "principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. U.S.*, 111 S. Ct. 1854, 114 L. Ed.2d 385 (1991). Federal courts sitting in diversity must apply state, not federal law in construing D&O policies. *Reliance Insurance Co. v. Weis, et al.*, 148 B.R. 575 (E.D. Mo. 1992), *aff'd* 5 F.3d 532 (8th Cir. 1993) (Delaware law); *Fidelity and Deposit Co. of Maryland v. Zandstra*, 756 F. Supp. 429 (N.D. Cal. 1990) (California law); *American Casualty Company v. Baker*, 758 F. Supp. 1340 (C.D. Cal. 1991) (Oklahoma law); *Gary v. American Casualty Co.*, 753 F. Supp. 1547 (W.D. Okla. 1990) (Oklahoma law), *aff'd on other grounds sub nom. FDIC v. American Casualty Co.*, 975 F.2d 677 (10th Cir. 1992).

The District Court below found the policy's choice of law provision controlling and determined that Delaware law must be applied:

> . . . [T]he insurance policy in question clearly states that Delaware law shall control in cases regarding interpretation and application of the policy. Section VI, subsection J. . . . [T]herefore this Court elects to apply Delaware law as to the interpretation and validity of the insurance policy at issue, especially with regard to Endorsement 1.

P. App. 12a.

The petitioner concedes that Delaware law "is the law applicable to the [Reliance policy]. . ." Petitioner's Brief, p. 17, n. 7. Reliance can conceive of no compelling reason why this Court should use this case to jump into the thicket of insurance

policy interpretation, an area long governed by state law. As there is no controlling federal question at issue, this Court should deny the petitioner's writ of certiorari.

Insofar as the opinion below states that the Plan Committee, as BBC's bankruptcy representative, merely stands in BBC's shoes, that decision is in total accord with federal and state precedent. *See* Point IV below. As such, this decision fosters no conflict with any circuit.

III. THE QUESTIONS DECIDED IN THIS CASE WILL NOT GENERATE EXTENSIVE LITIGATION

The petitioner baldly contends that the questions presented here will arise in *every* bankruptcy in which there is a claim against the directors or officers and a policy of directors and officers liability insurance. However, the petition has failed to identify a single precedent interpreting an "insured vs. insured" exclusion in a claim in a commercial bankruptcy.

The impact of this decision on cases arising out of private, corporate bankruptcies cannot under any stretch of imagination be as great as predicted. If the issue was as significant as portrayed by the petitioner, surely a similar dispute would have surfaced in other commercial bankruptcies where D&O insurance was involved, and the petitioner would rely upon the decisions from those bankruptcy cases rather than the bank failure cases to which it is forced to analogize.

Directors and officers of companies with D&O policies are quite capable of reading their policies and apprehending that the insurer is unwilling to cover certain defined risks, such as the company's claims against its own officers. Knowing that their insurance policies in plain and unequivocal terms exclude such claims asserted before the bankruptcy of their company, it is easy enough for them to understand that they will not be covered for the same claim post-bankruptcy. If they are unhappy with the policy, they can either try to negotiate its terms before purchasing it, or buy a better policy from another insurer. Disputes between bankrupt corporations, their officers, and their D&O insurers on the scope of the insured v. insured exclusion thus will

not often arise, as all parties must readily recognize that such a claim constitutes a risk that the insurer is not willing to insure and one the courts are unwilling to compel it to cover.

Of interest, other courts have upheld similar insured vs. insured exclusions in directors and officers policies. *Fidelity and Deposit Company of Maryland v. Conner*, 973 F.2d 1236 (5th Cir. 1992); *Bendis v. Federal Ins. Co.*, No. 89-2035-S, 1989 WESTLAW 161437 (D. Kan. Dec. 4, 1989), *aff'd on other grounds*, 958 F.2d 960 (10th Cir. 1991); *Levy v. National Union Fire Ins. Co.*, 889 F.2d 433 (2d Cir. 1989); *Powell v. American Casualty Insurance Company of Reading*, 772 F. Supp. 1188 (W.D. Okl. 1991). In so doing, these courts have implicitly rejected the view that such exclusions would have the detrimental effect on corporate life suggested by the petitioner. In the *Conner* case, the Fifth Circuit enforced the exclusion in a third-party claim by a director against former directors:

> We find that there is no interpretation of the insured v. insured exclusion as it pertains to the third party claims asserted by Conner - that is, the plain language of the insured v. insured exclusion bars Conner's claims against his former colleagues.

973 F.2d at 1245.

In *American Casualty Company of Reading, Pa. v. FDIC*, 944 F.2d 455 (8th Cir. 1991), which upheld the "regulatory exclusion" of a D&O policy issued to a bank later taken over by the FDIC, the court expressed views equally applicable to the petitioner's contention:

> The parties are sophisticated business people who dealt [with each other] at arm's length . . . We will not discard their agreement and remake their business relationship . . . Nor can we agree that . . . [the policy] was unconscionable. It was a bargain struck by adult business people. We have no reason to suppose that a better deal could have been gotten for the bank from any other insurer.

944 F.2d at 459-460.

While the petitioner asserts that the decision below removed the protection of insurance coverage "at the very moment when it is of the greatest value", Petitioner's Brief, p. 18, BBC's officers had to know in advance, merely by reading the Reliance policy, that claims against them by or on behalf of BBC would not be covered. As insurance policies remain intact and binding after bankruptcy, this decision will not have any major impact on such proceedings, deter officers from such employment, or generate new sources of disputes between such parties.

In fact, Endorsement No. 1 is for all practical purposes unaffected by the filing of a petition in bankruptcy. The insureds under the policy have no lesser protection as a result of this endorsement post-petition as they would have pre-petition.

IV. THE COURT OF APPEALS CORRECTLY DECIDED THE QUESTIONS PRESENTED

The court below correctly concluded that the Plan Committee Action is a claim on behalf of BBC against its former officers. It followed the longstanding rule that a bankruptcy representative "stands in the shoes" of the debtor corporation under its contracts and insurance policies, subject to the same defenses that could have been raised against the bankrupt corporation and possessing the same rights and causes of action of the corporation. The Court of Appeals also correctly held that the Plan Committee Action was not a shareholders derivative action, as none of the prerequisites for filing such a suit were met.

A. *Because A Bankruptcy Representative's Causes of Action Are Derived From Those Previously Held By The Debtor Company, The Plan Committee Action Is An Action On Behalf Of BBC*

The lower courts held that pursuant to the Bankruptcy Code, the Plan, and the relevant case law, the Plan Committee Action is a claim on behalf of BBC. The courts correctly saw no meaningful distinction in relation to the Plan Committee's causes of action between BBC and its bankruptcy estate, as the estate and the vehicle through which it acts, the Plan Committee, merely derive their rights and claims from BBC.

The petitioner states that the opinion below erroneously "ignored the separate legal existence of the bankruptcy estate and the debtor. . ." Petitioner's Brief, p. 14. Rather, the district court stated that for the purpose of determining whether the "insured v. insured" exclusion applied, there was "no significant legal distinction" between BBC and its bankruptcy estate, since the Plan Committee Action was a claim filed on behalf of BBC and its estate. P. App. 2a. The action on behalf of either entity was based on BBC's rights, BBC's officers' misconduct, and BBC's damages, and is a claim "by or on behalf of" BBC within the plain language of Endorsement No. 1.

The documents and pleadings in BBC's bankruptcy proceeding creating the Plan Committee reveal that it could only pursue claims which passed from BBC to the estate and then to the Committee. BBC's claim against its officers was transferred to the Plan Committee, as were its rights under the D&O policy.

The Plan Committee acquired BBC's rights subject to all contractual and common law defenses and obligations that existed when bankruptcy was filed. *In re Feiereisen*, 56 B.R. 167 (D. Oregon 1985) (the bankruptcy trustee stands in the shoes of the debtor and has the same rights and duties under the debtor's insurance policy); *In re Daisy Systems Securities Litigation*, 132 B.R. 752 (N.D. Cal. 1991) (insurance policies are property of the bankruptcy estate); *In re Light*, 23 B.R. 482 (E.D. Mich. 1982). In *In re Light*, *supra*, the Court described a bankruptcy trustee's status under a debtor's insurance policies as follows:

> . . . a trustee in bankruptcy . . . is not an independent co-insured under a policy of insurance. Rather, the bankruptcy trustee takes interest in the insurance policy pursuant to the interest of the debtor . . . "standing in the shoes", as it were.

23 B.R. at 484.

The claim against BBC's officers, now prosecuted by the Plan Committee, must meet the same fate under the Reliance policy as if it was pursued by BBC: it is excluded from coverage due to Endorsement No. 1.

The lower courts' opinions were also a proper application of the principle that BBC's bankruptcy did not alter or expand Reliance's obligations or BBC's or any other insureds' rights under the Reliance policy. *See In Re Ozark Restaurant Equipment Company, Inc.*, 816 F.2d 1222 (8th Cir. 1987); *In Re Louisiana World Exposition, Inc.*, 832 F.2d 1391 (5th Cir. 1987); *In Re Daisy Systems Securities Litigation*, 132 B.R. 752 (N.D. Cal. 1991). The policy's terms, conditions, and exclusions, including the "insured vs. insured" exclusion, remain fully enforceable after BBC's bankruptcy.

As the petitioner notes, bankruptcy is not intended to protect the bankrupt corporation's insurance companies. Petitioner's Brief, p. 19. No such protection has been granted to Reliance, since a claim by BBC for breach of fiduciary duties against its officers would have been excluded before or after BBC's bankruptcy. The petitioner's contention that the decision below constitutes an unjustifiable windfall for Reliance is therefore preposterous.

The petitioner cites other irrelevant cases, *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986 (1985) and *Pepper vs. Litton*, 308 U.S. 295, 60 S. Ct. 238 (1939) in support of the proposition that the Plan Committee represents the creditors and shareholders of BBC. In *Commodity Futures*, the issue was whether a trustee could waive the corporation's attorney-client privilege on pre-bankruptcy communications. That clearly has no bearing upon a bankrupt company's status under an insurance policy. The Court merely indicated that the trustee has a fiduciary duty to the shareholders as well as the creditors of the bankrupt corporation. Whether or not the Plan Committee owes such duties, its rights under Reliance's policy are no greater than those previously possessed by BBC. Similarly, *Pepper v. Litton* is inapplicable as it primarily involved the disallowance by the bankruptcy court of a claim against the estate by the dominant shareholder of the bankrupt company. It in no way refutes the principle that a bankruptcy trustee or other representative stands in the shoes of the debtor in asserting the debtor's claim.

B. *The Plan Committee Action Is Not A Claim On Behalf Of BBC's Creditors*

A representative in bankruptcy has no legal standing to assert claims on behalf of the bankrupt's creditors. *See Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 429, 92 S. Ct. 1678, 32 L. Ed.2d 195 (1972); *In re Ozark Restaurant Equipment Co., Inc., supra*; *In re Petroleum Corp. of America*, 417 F.2d 929 (8th Cir. 1969). The bank failure decisions cited by the petitioner, such as *American Casualty Co. vs. FDIC*, 791 F. Supp. 276 (W.D. Okla. 1992), and *Fidelity and Deposit Co. v. Zandstra*, 756 F. Supp. 429 (N.D. Cal. 1990), add nothing to the analysis in this case, because in those cases federal banking statutes provided that the FDIC and FSLIC could sue as successors to the failed bank, in their own right as creditors, and also on behalf of the bank's creditors. Under the Bankruptcy Code, the Plan, the Disclosure Statement, and the Reliance policy, the Plan Committee merely stands in the shoes of BBC when prosecuting its claims against BBC's former officers. It does not represent the creditors of that company.

The petitioner also argues that the Plan Committee acts on behalf of creditors, because they benefit from any recovery obtained by the Plan Committee. In rejecting this argument, the lower court stated that "the pending State Court action was filed on behalf of BBC and its estate, although the benefits sought may eventually inure to the creditors." P. App. 2la. Whether BBC's creditors benefit from the Plan Committee action is irrelevant; the ultimate question is on whose behalf was the action commenced? As a bankruptcy representative possesses only those rights or causes of action transferred to it by the debtor, the answer must be "on behalf of" the debtor, BBC.

The petitioner quotes *In re Fidelity America Financial Corp.*, 43 B.R. 74 (Bkrtcy. E.D. Pa. 1984): "[t]he trustee acts as the representative of the estate, managing its funds for the benefit of its creditors." Petitioner's Brief, p. 15. This indicates that the bankruptcy trustee acts as the estate's representative, not the creditors'. While the trustee may manage funds for the creditors' benefit, the trustee in no official sense represents those creditors.

C. *The Bank Failure Cases Extensively Relied Upon By Petitioner Have No Bearing Upon The Interpretation Of A Directors and Officers Liability Insurance Policy In The Bankruptcy Of A Commercial Corporation Under The U.S. Bankruptcy Code*

If the insured vs. insured exclusion is as significant in banking matters as averred by the petitioner, any case reaching this Court on that point should undoubtedly arise out of an actual bank failure handled by federal banking regulators. Only in such a case would a full record be presented reflecting the purported significance of the exclusion on the regulation and operation of such institutions.

The District Court and the Court of Appeals correctly recognized the inapplicability of precedent relating to failed financial institutions:

> The Court has carefully reviewed the caselaw cited by the parties. Unfortunately, these cases are not extremely helpful in providing guidance to the Court. The majority of cases cited deal with exclusion clauses similar to the present one, however, the interpretation and application of the clause is limited to facts involving bank failures. The principles espoused are restricted to the unique situation of the FDIC or the RTC taking control of a failed bank. The present situation deals with a bankrupt corporation no longer physically or legally in existence as it had been before the bankruptcy. The Court is constrained to draw from the basic tenets of insurance law and bankruptcy law in order to resolve this matter.

P. App. 14a.

In a case cited by the petitioner, *Office and Professional Employees' Int'l Union, Local 2 v. FDIC*, 962 F.2d 63 (D.C. Cir. 1992), the court found that as the claim procedures of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA") do not define the terms "claim" and "claimant", it was appropriate to borrow the bankruptcy law's

definition of these terms. In the instant action, the provisions of FIRREA or any other federal banking statute are not at issue. Further, *Office and Professional Employees* did not find a direct analogy between federal banking law and the Bankruptcy Code, it merely stated that the terms of statutory scheme could be borrowed to clarify a gap in another statute. From this limited finding, the petitioner leaps to the faulty premise that the status of the FDIC under the banking laws is similar to the Plan Committee under the Bankruptcy Code. BBC was not a bank and the Plan Committee is simply not the FDIC.

The petitioner incorrectly relies upon bank failure cases such as *F.D.I.C. v. American Casualty Co.*, 814 F. Supp. 1021 (D. Wyo. 1991) and *Continental Casualty Co. v. Allen*, 710 F. Supp. 1088 (N.D. Texas 1989) to assert that insured v. insured exclusions are ambiguous unless they actually refer to the specific person or entity in question. Petitioner's Brief, p. 12. The Reliance exclusion is quite clear, however, in referring to claims "on behalf of" the company, which unambiguously encompasses claims in or out of bankruptcy by BBC's agents or representatives. Moreover, in the *Allen* case, the court found that the exclusion was ambiguous primarily because there was proof in the record of the insurer's own witness' "inability to understand the definition of 'insured' and meaning of the endorsement." 710 F. Supp. 1088 at 1098. There is absolutely no proof in the record in the instant case that any party or any insured did not understand the exclusion in the Reliance policy. Hence, under the reasoning of *Allen*, there is no basis to support a finding of ambiguity in Endorsement No. 1.

In the same vein, the Reliance exclusion would not have been found ambiguous by the *American Casualty* court, as the exclusion clearly applies to any claim brought not only by the insured company but on its behalf, such as a claim passing from BBC to its bankruptcy estate and the Plan Committee.

A very recent decision by the United States District Court, Southern District of New York, further confirms that the decision below is entirely consistent with the principles governing bankruptcy representatives' rights under insurance policies issued to the debtor. *Niemuller v. National Union Fire Insurance*

Company of Pittsburgh, Pa., 92 Civ. 0070 (SS), 1993 U.S. Dist. LEXIS 18476 (December 29, 1993). In a case involving the assignment of a corporation's breach of fiduciary duty claim against its officer, the court enforced against the defendant a comparable insured vs. insured exclusion in a D&O policy, finding that an assignee "stands in the shoes" of the assignor corporation and is subject to the same defenses as that corporation. The court emphatically rejected the defendant's reliance upon the bank failure cases (also cited by the petitioner herein) relating to the insured v. insured exclusion.

Addressing the rights of an assignee of a corporation rather than its bankruptcy representative, *Niemuller* applies with equal force to the Plan Committee Action and the exclusion in the Reliance policy:

> It is clear law that an assignee steps into the shoes of the assignor and gains only so much as that to which the assignor is entitled. See Septembertide Publishing B.V. v. Stein & Day, Inc., 884 F.2d 675, 681-82 (2d Cir. 1989), citing International Ribbon Mills, Ltd. v. Arjan Ribbons, Inc., 36 N.Y.2d 121, 126, 325 N.E.2d 137, 365 N.Y.S.2d 808 (1975) ("It is elementary ancient law that an assignee never stands in any better position than his assignor. He is subject to all equities and burdens which attach to the property assigned because he receives no more . . . than his assignor.") An assignee is in no better or worse position than the assignor. . . .
>
> This traditional rule is no less applicable to the present case. DDCC and Sussex will become party plaintiffs in the pending Qantel litigation claims solely due to a transfer of interest. . . . They gain nothing more than Qantel, but similarly they are placed in no worse a position. Thus, if the Policies exclude the claims brought by Qantel, which plaintiff admits they do, then they also exclude those claims continued by successors-in-interest.

1993 U.S. Dist. LEXIS 18476, pp. 7-9.

The court convincingly distinguished the banking cases cited by the defendant and by the petitioner in the case at bar:

> In support of his argument that the Exclusion Clause extends only to a suit brought "by" Qantel and not successors-in-interest as assignees, Niemuller relies upon cases from other jurisdictions which involve regulatory banking agencies. These cases, however, are wholly distinguishable.
>
> The primary and determinative distinction between the entities involved in those cases and the assignees in the instant case is that the assignees in the cases noted by plaintiff are statutorily created entities charged by federal or state law with the obligation to pursue certain claims, including claims of other interested parties such as creditors. Thus, the rights and claims brought by these statutory entities are not analogous to those of an ordinary assignee.
>
> Plaintiff relies primarily on the reasoning of Fidelity & Deposit Co. of Md. v. Zandstra, 756 F. Supp. 429 (N.D. Cal. 1990), and cases adopting its approach. See American Casualty Co. of Reading, Pa. v. Baker, 758 F. Supp. 1340 (C.D. Cal. 1991) (following Zandstra); Finci v. American Casualty Co. of Reading, Pa., 323 Md. 358, 383, 593 A.2d 1069 (1990) (citing Zandstra and American Casualty Company). . . . However, as the court in Zandstra explicitly recognized, the FDIC was not an ordinary assignee and, thus, deserved dissimilar treatment from that accorded other assignees in the same situation.
>
> In reaching its decision that the Exclusion Clause did not apply, the court noted the unique character of the FDIC. As the court stated, regulatory banking agencies have greater standing than ordinary successors-in-interest because they, empowered by statute, represent the bank as well as the creditors, depositors and shareholders of the bank. . . . [T]he

> Zandstra court concluded, "the FDIC did not merely stand in the shoes of the original party." . . .
>
> * * *
>
> As noted previously, and in no way undermined by the regulatory cases cited by Niemuller, ordinary assignees have neither independent claims nor any greater rights than those belonging to their assignors. Therefore, there is no reason to rely upon the regulatory cases cited by Niemuller in interpreting the Exclusion Clause at issue in this case.

Id. 9-12.

Whatever special right the FDIC may have to circumvent exclusions in a bank's D&O policy, that right simply was not conferred upon the Plan Committee in the instant matter or the assignees of Qantel in *Niemuller*.

D. *As Found By The Lower Courts Herein, Because The Plan Committee Action Is Not A Shareholders' Derivative Action, It Does Not Fall Within The Narrow Derivative Suit Exception To The "Insured vs. Insured" Exclusion.*

The Plan Committee Action is neither a shareholders' derivative action nor comparable to such an action, since it fails to comply with Delaware's statutory requirements for a shareholders' derivative suit. Even if the Plan Committee Action is, in the petitioner's words, in "the nature of a derivative suit," Petitioner's Brief, p. 16, it would not fall within the narrow exception of the exclusion that encompasses only actual derivative suits. The lower courts correctly found the petitioner's construction of the shareholders' derivative suit part of Endorsement No. 1 to be "meritless." P. App. 21a.

None of the requirements for a derivative action under Delaware law have been met by the Plan Committee Action:

> . . . the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction

> of which he complains for his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort.

Chancery Court Rule 23.1 Del. C. Ann. *See also* § 327 Del. Corp. Law Annotated.

The lower court correctly found that the Plan Committee Complaint lacked any allegations about shareholders or their efforts to obtain through the BBC's directors the relief sought in the Complaint. As "[n]one of the prerequisites under Delaware law for filing a shareholders derivative action have been met" the action did not fall within the exception to the exclusion. P. App. 21a.

In any event, it is clear that this entails Delaware law, and not a matter of federal law warranting review by this Court.

The petitioner also contends that the Plan Committee Action is in "the nature of a derivative suit," in asserting claims for breach of fiduciary duty that *could have* been asserted by shareholders. Asserting claims that *could have* been pressed by shareholders does not transform this suit into an *actual* shareholders derivative action. *Fidelity and Deposit Company of Maryland v. Conner, supra; Evanston Insurance Company v. FDIC*, 1988 U.S. Dist. LEXIS 16263 (C.D. Cal. 1988). An actual shareholders derivative action is the only exception to the exclusion in the Reliance policy. *See* also, *FDIC v. American Casualty Company of Reading, Pa.*, 998 F.2d 404, 409 (7th Cir. 1993): "The FDIC's complaint contains none of the allegations necessary to maintain a shareholder derivative action under Fed. R. Civ. P. 23.1, such as the Bank's refusal to file suit."

By the guise of artful construction, the petitioner seeks to impose an obligation upon Reliance to which it never agreed. However, the controlling Delaware rules of construction prohibit a court from crafting an interpretation that is inconsistent

with the intent of the parties or the clear language of their agreement. *New Castle County v. Hartford Accident & Indemnity Co.*, 970 F.2d 1267, 1270 (3d Cir. 1992); *Hallowell v. State Farm Mutual Automobile Ins. Co.*, 443 A.2d 925 (Del. 1982); *Aetna Casualty & Surety v. Kenner*, 570 A.2d 1172, 1174 (Del. Supr. 1990); Delaware's Supreme Court has stated that the words of an insurance policy should not be destroyed or twisted under the guise of construing them. *Aetna Casualty & Surety v. Kenner*, 570 A.2d at 1174; *Hallowell v. State Farm Mutual*, 443 A.2d at 926. The lower courts herein were well aware of Delaware's rules of construction in refusing to stretch the shareholders' derivative exception in Endorsement No. 1 to the unwarranted lengths sought by the petitioner.

V. THERE ARE NO SIGNIFICANT MATTERS OF PUBLIC POLICY IMPLICATED BY THIS CASE, WHICH MERELY INVOLVES THE INTERPRETATION OF AN EXCLUSION IN AN INSURANCE POLICY ISSUED TO DIRECTORS AND OFFICERS

If the petitioner's dire views of this decision were accepted, every time a corporation with a dispute over the exclusions in its insurance policy entered bankruptcy, an overriding question of federal bankruptcy law would be triggered. From the petitioner's perspective, if the insured v. insured exclusion is upheld in bankruptcies, no prudent person would serve on a board or act as an officer of a corporation. A series of cases, however, have already upheld insured v. insured exclusions, both in the corporate and failed bank settings. Of course, our economy has not come to a screeching halt occasioned by the abrupt resignation of corporate directors and officers, or the inability of companies to find new, qualified, and willing candidates for such positions. Seasoned executives are no more likely to withdraw from corporate life because of the insured v. insured exclusion in a D&O policy than homeowners are likely to give up their homes because of exclusions in their homeowners' liability insurance policies.

Furthermore, if the exclusion is as onerous as suggested by the petitioner, perhaps insureds should negotiate with their insurers to eliminate it from their D&O policies.

When insurance policies are issued to corporations whose officers and directors can gauge the scope of coverage and the effect of the exclusions by simply reading their terms and conditions, no overriding federal public policy concern is created. The interpretation of such policies has long been a matter of state law. The petitioner asks this Court to rule on a matter of Delaware insurance law, without demonstrating how the opinion below unduly impairs or affects urgent matters of federal public policy. There is simply no persuasive reason for this Court to become involved in such a straightforward interpretation of an insurance policy governed by Delaware law.

CONCLUSION

For the reasons discussed above, the petition for a writ of certiorari should be denied by this Court.

Dated: New York, New York
January 21, 1994

Respectfully submitted,

PERRY KREIDMAN

Counsel of Record

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Attorneys for Respondent
Reliance Insurance Company

Of Counsel:
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JONATHAN C. THAU
DAVID S. HEBBELER

APPENDIX

A. THE INSURANCE POLICY AND DECLARATIONS

INSURANCE POLICY

Endorsement No. 4

It is understood and agreed that:

1. Insuring Agreement I.A is amended by adding the following:

> If the Company is permitted or required by law to ultimately indemnify a Director or Officer, or to advance costs and/or defense expenses on their behalf and does not in fact do so other than for reason of the Financial Insolvency of the Company, then the Insurer shall pay all loss on behalf of the Director or Officer, subject to the third listed deductible amount set forth in Item D, Retention, of the Declarations and all provisions, terms and conditions of this policy.

* * *

VII GENERAL CONDITIONS

* * *

J. Situs

This policy, to the extent permitted by applicable law, shall be construed in accordance with the law of the jurisdiction of incorporation of the Company named in Item A of the Declarations or, in the case of matters pertaining to a Subsidiary, the law of the jurisdiction or incorporation of such Subsidiary.

DECLARATIONS

ITEM A: Name of Insured and Address:

Bank Building & Equipment Corporation of America
3630 South Geyer Road
St. Louis, Missouri 63127

* * *

ITEM D: RETENTION

$ 2,500.00	each Director or Officer, each loss, including claim expense, but in no event exceeding
$ 10,000.00	in the aggregate each loss, including claim expense, as respects Directors and Officers
$150,000.00	in the aggregate each loss, including claim expense, as respects Company Reimbursement

* * *

B. FIRST AMENDED JOINT PLAN OF LIQUIDATION OF BBC

* * *

1.12 Consolidated Debtors shall mean the procedurally combined estates of *In re Bank Building and Equipment Corporation of America*, Case No. 90-02011-BKC-DPM, *In re BBC Manufactured Buildings, Inc.*, Case No. 90-02571-BKC-DPM and *In re Accesseron Products, Inc.*, Case No. 90-02572-BKC-DPM.

* * *

12.1 This Plan contemplates the liquidation of all the property of the Consolidated Debtors . . . and the prosection of any and all claims or causes of action held by the estates of the Consolidated Debtors by the Plan Committee . . . on behalf of the estates both prior to and after the Effective Date, to the extent the Plan Committee believes such prosecution to be feasible and warranted.

* * *

12.3 . . . Once appointed, the Plan Committee . . . shall be responsible for prosecuting and defending any and all claims and causes of action relating to the Consolidated Debtors' estate, including, without limitation (1) claims of each estate against any Person (including, without limitation, any claims or causes of action arising under Sections 544, 545, 547, 548, 549 and 553(b) of the Bankruptcy Code), (b) claims of any Person against the estates or related Persons which affect the estates or interests of Creditors therein, and (c) objections to Disputed Claims scheduled or filed against the estates.

* * *

14.1 . . . The Plan Committee thereafter shall have the same authority to act for the Consolidated Debtors as a board of directors for each of the Consolidated Debtors and it shall

continue to act until all assets are liquidated, all distributions are made to Creditors pursuant to this Plan and a final decree is entered closing each bankruptcy estate, whereupon all of its powers and rights shall terminate and it shall be deemed dissolved. Upon confirmation, all causes of action belonging to any of the Consolidated Debtors shall vest and be brought in the name of the Plan Committee, on behalf of the particular Consolidated Debtor or Debtors in which the cause of action had been previously vested . . .

C. DISCLOSURE STATEMENT

* * *

V. ONGOING LIQUIDATION EFFORTS

* * *

One of the potential causes of action is a claim by BBC against certain of its former officers . . . arising out of the alleged failure of certain BBC officers . . . to detect and take significant action to prevent certain misconduct and fraud by Loughman Division officers and employees at the Loughman Division of BBC. The alleged misconduct of management of the Loughman Division and the potential causes of action are set forth in the report of the Court appointed Examiner David A. Warfield, who conducted an in depth review of the allegations at BBC's Loughman Division.

* * *

In the event legal action is not instituted prior to the Confirmation Date, Proponents expect the Plan Committee to employ special counsel to review the findings of the Examiner's report in order to determine in greater detail the possible legal actions available against certain officers of BBC . . . , to further investigate insurance coverage available under the D&O policy, to assess and calculate any damages and to pursue any appropriate legal action on behalf of BBC.

* * *

VII. THE PLAN OF LIQUIDATION

* * *

6. Reservation of Rights. The Plan Committee, by and through the Agent, shall have the right to bring all actions and proceedings belonging to the Consolidated Debtors or their Estates . . .

D. COMPLAINT IN THE PLAN COMMITTEE ACTION

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

RICHARD MILLER, as the Liquidation and Distribution Agent on behalf of H. BERNARD ENGEL; JAMES BURZYNSKI, as the representative of Jim & Slim's Tool Supply; and ARTHUR SHAFER, as the representative of Morgan Drive-Away, Inc., acting in the name of the Plan Committee for the Bankruptcy Estate of Bank Building and Equipment Corporation of America,

Plaintiffs,

v.

DOUG CLEMENTS,

Serve: 205 West Fourth
Waterloo, IL 62298
Monroe County, Illinois

CARL J. WEIS JR.,

Serve: 721 Twin Fawns Drive
St. Louis, MO 63131
St. Louis County, Missouri

MYRON CARPENTER,

Serve: 843 Gardenway Drive
Ballwin, MO 63011
St. Louis County Missouri

Defendants.

Cause No.
Team/Division

PETITION

Plaintiffs, for the Petition against Defendants and each of them, state as follows:

Parties

1. On or about April 30, 1990, Bank Building and Equipment Corporation of America ("BBC") filed for relief under Chapter 11 of the United States Bankruptcy Code. On July 22, 1991, the First Amended Joint Plan of Liquidation of BBC ("Plan") was confirmed by the court. Pursuant to the Plan, all causes of action belonging to the bankruptcy estate vest and shall be brought in the name of the Plan Committee, which has sole responsibility for implementing the Plan.

* * *

95. As President of Loughman, Clements had a fiduciary duty to BBC to act in the best interests of BBC.

96. Clements instead used his position as an officer and employee of BBC to further his own interests at the expense of BBC, as aforesaid, thereby breaching his fiduciary duty . . .

* * *

98. . . . As a direct result of the contracts wrongfully accepted by Clements, BBC lost in excess of $8,000,000.

99. Additionally, if Clements had not breached his duty to BBC as alleged, BBC would not have been forced to liquidate and would be an ongoing, profitable business. Clements therefore also damaged BBC by denying it the profits it could reasonably have been expected to earn, reasonably estimated to be in excess of $15,000,000.

* * *

102. Weis, as Chief Executive Officer, and Carpenter, as Chief Financial Officer, of BBC owed a duty to BBC to exercise the care

that an ordinarily careful and prudent person would use in managing BBC and its subsidiaries and supervising their subordinates.

103. As more particularly alleged above, Weis and Carpenter breached their duty of care to plaintiffs by negligently and carelessly failing to supervise Clements and the operations of Loughman, thereby permitting Clements to destroy Loughman – and with it BBC . . .

104. As a direct result of Weis' and Carpenter's negligence, as aforesaid, BBC lost in excess of $8,000,000. Moreover, as a direct result of their negligence, BBC was unable to survive as a profitable business which reasonably could have been expected to earn profits in excess of $15,000,000.

* * *

Supreme Court, U.S.
FILED
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(3)

No. 93-1028

IN THE

Supreme Court of the United States

October Term, 1993

BANKRUPTCY PLAN COMMITTEE
OF THE BANK BUILDING & EQUIPMENT CORP.
OF AMERICA, IN LIQUIDATION

Petitioner,

vs.

RELIANCE INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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H. Todd Iveson
Joe D. Jacobson*
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Bankruptcy Plan Committee.

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REPLY ARGUMENT

I. QUESTIONS OF FEDERAL, NOT STATE, LAW ARE CONTROLLING HERE.

Reliance Insurance Co. states in its opposition to the petition:

> This writ should also be denied since the Court of Appeals did not ultimately decide a controlling question of federal law. It merely affirmed the District Court's interpretation of the Reliance policy under Delaware law.

Opposition at 13 (emphasis omitted). This statement does not fairly or accurately reflect the basis of the decisions below. To the contrary, the district court stated, in its opinion adopted by the court of appeals, that federal bankruptcy law, and not state contract law, controlled its decision:

> The phrase "on behalf of the Company" takes on special meaning due to the bankruptcy.... [T]he phrase in question must be construed within the realm of bankruptcy law.... [T]he issue central to this case is what is meant, under bankruptcy law, by the phrase "on behalf of the Company".

Petition Appendix ("App.") at pages 14a-15a.[1]

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[1] As noted in the Petition, the courts below found that, in light of the multiple provisions of the policy addressing the issue of bankruptcy, the absence of an express exclusion for actions brought by a bankruptcy trustee or on behalf of a bankruptcy estate would lead to the conclusion, under Delaware law, that such actions were not excluded from coverage. It was only the lower courts' decision to seek a special meaning under bankruptcy law for the phrase "on behalf of the Company" that led to the conclusion that actions brought by the Bankruptcy Plan Committee, as trustee of the estate, were brought on behalf of the debtor company. *See* discussion in Petition at 5-6, and 14 n.6, *citing* App. 15a.

Furthermore, both the bankruptcy estate and the bankruptcy trustee are creations of federal law. This case presents questions regarding the precise nature of the bankruptcy estate, and the estate's and trustee's legal relationship to the debtor. These are indisputably questions of federal law, and are the very questions raised in the petition. *See* Brief of *Amicus Curiae*, National Association of Bankruptcy Trustees, In Support of Granting *Certiorari* ("Amicus Brief") at 2-3 ("the decision below is based upon an erroneous view of the nature of a bankruptcy estate and the role of the bankruptcy trustee").

II. RESPONDENT'S OPPOSITION ASSUMES, RATHER THAN ESTABLISHES, ITS FUNDAMENTAL PREMISES.

The important and difficult questions presented by the petition revolve around a determination of the nature of the bankruptcy estate, and the estate's and bankruptcy trustee's legal relationship to the debtor. Respondent, however, avoids these questions by assuming without explanation that the terms "debtor" and "bankruptcy estate" are interchangeable. Respondent's assumption is contrary to law,[2] and it is also unsupported by the record documents on which it relies.

For example, Article XII, Section 12.1 of the Plan of Liquidation (the "Plan") provides that the Bankruptcy Plan Committee will prosecute "any and all claims or causes of action held *by the estates* of the Consolidated Debtors ... *on behalf of the Estates* ...." App. 5a; Resp.App. B-1 (emphasis added). This provision does not state, as respondent suggests, that the Bankruptcy Plan Committee is to prosecute causes of action on behalf of the debtor company, BBC. Similarly, if the debtor and its estate are one and the same, as respondent suggests, why do the bankruptcy documents carefully distinguish between them? *See, e.g.*, Art. VII, Section (C)6

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[2] *See* Petition at 14-15; Amicus Brief at 2-3.

of the Disclosure Statement, which provides: "The Plan Committee ... shall have the right to bring all actions and proceedings belonging to the Consolidated Debtors *or* their Estates...." Opposition at 5; Resp.App. C-1 (emphasis added).[3]

Petitioner does not dispute that, in bringing suit against the directors and officers, the Bankruptcy Plan Committee was asserting claims "in the right of" BBC or "derived from" BBC. The source of the rights asserted, however, presents an issue distinct from the question presented in the Petition regarding *on whose behalf* those rights are asserted. The National Association of Bankruptcy Trustees, *amicus curiae* herein, states this succinctly: "The bankruptcy trustee, although acting pursuant to rights derived from the debtor, acts on behalf of the creditors." Amicus Brief at 3.

III. RESPONDENT MISAPPREHENDS THE SIGNIFICANCE OF THE BANKRUPTCY PLAN COMMITTEE'S SUIT BEING THE EQUIVALENT OF A SHAREHOLDERS DERIVATIVE SUIT.

Respondent argues that the procedural requirements for a shareholders derivative suit were not satisfied in this case. Opposition at 24-25. This argument is besides the point. Petitioner does not contend that its state court lawsuit is a shareholders derivative action. Rather, petitioner contends that the insurance policy at issue divides actions brought on behalf of the company into two categories—shareholders

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[3] Respondent also misquotes Section 1.31 of the Plan in support of its equation of the debtor and the debtor's bankruptcy estate. *Compare* Opposition at 3 with App. 5a ("Plan Committee shall mean the Committee of three individual *creditor* representatives...") (emphasis added). Even when accurately quoted, however, this provision adds nothing to respondent's argument: the question here is the Bankruptcy Plan Committee's legal status and the capacity in which it acts, not how the members of the committee were selected.

derivative actions, which are covered; and certain other actions, which are not—and that, given the provisions of bankruptcy law vesting the right to bring stockholder derivative actions in the bankruptcy trustee, this case does not fall neatly into either of the two categories. Because the state court suit filed by the Bankruptcy Plan Committee is closely akin to a shareholders derivative action and does not reflect the type of collusion which the "insured v. insured" exclusion is intended to guard against, the policy should be interpreted to provide the directors and officers with coverage for the Bankruptcy Plan Committee suit.[4]

CONCLUSION

Petitioner requests the petition for *certiorari* be granted.

Respectfully submitted,

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---

[4] Respondent's glib suggestion that, "if the exclusion is as onerous as suggested by the petitioner, perhaps insureds should negotiate with their insurers to eliminate it from their D&O policies," Opposition at 26, cannot be taken seriously. The standardized terms offered by insurance companies in their policies are typically "non-negotiable." Furthermore, respondent's argument cuts both ways: if an insurer wishes to exclude from D&O coverage actions brought by a bankruptcy trustee or on behalf of a bankruptcy estate, the insurer can (more easily than the insureds) rewrite its policies to expressly state such an exclusion.

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No. 93-1028

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BANKRUPTCY PLAN COMMITTEE
OF THE BANK BUILDING & EQUIPMENT CORP.
OF AMERICA, IN LIQUIDATION,

Petitioner,

vs.

RELIANCE INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT RELIANCE INSURANCE CO. IN RESPONSE TO THE *AMICUS CURIAE* BRIEF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

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No. 93-1028

IN THE

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OCTOBER TERM, 1993

BANKRUPTCY PLAN COMMITTEE
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RELIANCE INSURANCE CO.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
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BRIEF OF RESPONDENT RELIANCE INSURANCE CO. IN RESPONSE TO THE *AMICUS CURIAE* BRIEF OF THE NATIONAL ASSOCIATION OF BANKRUPTCY TRUSTEES

REASONS FOR DENYING THE WRIT

This brief is submitted by the respondent, the Reliance Insurance Company ("Reliance"), in response to the amicus curiae brief of the National Association of Bankruptcy Trustees (the "Association"). The Association's brief is devoid of any facts or law relevant to these proceedings or any additional matters warranting this Court's consideration.

The issue framed by the Association on which there is a purported conflict, a bankruptcy trustee's right to represent the creditors of the bankrupt company, is simply irrelevant to the

determination of coverage under Reliance's D&O insurance policy pursuant to Delaware law.

Furthermore, the alleged conflict is found in cases that have nothing whatsoever to do with coverage under an insurance policy. The cases cited by the Association, in general, involve situations either where creditors asserted a claim against the directors and officers of the bankrupt company based upon the creditors' own injuries, or where creditors' claims were actually being pursued by the bankruptcy trustee. In contrast, the Plan Committee Action is predicated upon the officers' alleged breach of fiduciary duties to BBC rather than to its creditors, and BBC's damages rather than its creditors' damages.

There will be no adverse impact upon bankruptcy proceedings if the exclusion in the D&O policy stands. The purported distinction between BBC, its bankruptcy estate, and its bankruptcy representative, on the one hand, and its creditors on the other, does not undermine the lower court's ruling that the exclusion for claims "on behalf of" BBC applies to the Plan Committee Action.

Based upon the foregoing, the reasons advanced by the Association do not warrant this Court's review.

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE CONTROLLING QUESTIONS OF INSURANCE COVERAGE

The Association fails to identify a conflict among United States Courts of Appeals regarding the controlling issue in the case, the effect of an "insured vs. insured" exclusion of a directors and officers liability policy on a claim by a commercial corporation's bankruptcy representative against its former officers. The Association points to an alleged conflict among the circuits only on a bankruptcy trustee's *standing* to sue third-parties on behalf of creditors; however, the Plan Committee's standing on behalf of creditors or anyone else has never been questioned.

The Plan Committee Action was brought against the officers of BBC alleging a breach of fiduciary duty by these officers to

BBC, resulting in BBC's bankruptcy. As it made no reference to losses incurred by BBC's creditors, the Plan Committee was not pursuing a claim for such creditors.

The decisions relied upon by the Association do not involve determinations of coverage under an insurance policy.[1] This alleged conflict among the circuits does not justify a review of the lower court's decision on coverage under Reliance's D&O policy.

Of significance, this Court has already denied certiorari in two cases cited by the Association. *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987), *cert. denied*, 485 U.S. 906, 108 S. Ct. 1077 (1988); *In re Ozark Restaurant Equipment Co., Inc.*, 816 F.2d 1222 (8th Cir. 1987), *cert. denied*, 484 U.S. 848, 108 S. Ct. 147 (1987). Those two cases, as well as the other decisions cited by the Association, would have been more suitable than this case to review an issue of standing under the Bankruptcy Code.

II. AS THE LOWER COURT CORRECTLY RECOGNIZED, THE COVERAGE UNDER THE INSURANCE POLICY MUST BE DETERMINED IN ACCORDANCE WITH DELAWARE LAW

The limited issue decided herein is whether *under Delaware law*, the Plan Committee Action is excluded from coverage by

---

[1] *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988) (a trustee lacked standing to bring a lawsuit against the defendant on behalf of the debtor's creditors, even though the creditors had assigned to the trustee their claims arising from the bank's alleged participation in the debtor's fraudulent conduct); *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979 (11th Cir. 1990) (a bankruptcy trustee did not have standing to bring an action on behalf of creditors of the bankrupt dealer in government backed mortgage securities for negligence and improper interest charges); *St. Paul Fire & Marine Insurance Co. v. Pepsico, Inc.*, 884 F.2d 688 (2nd Cir. 1989) (corporation which had guaranteed the debts of its former subsidiary did not have standing to assert a claim against the subsidiary's new parent that was outside of the subsidiary's bankruptcy proceeding); *In Re Mortgage America Corp.*, 714 F.2d 1266 (5th

(Footnote continued)

Reliance's "insured vs. insured" exclusion. The Association instead portrays the decision below as touching upon matters of ". . . such importance to the bankruptcy system and to bankruptcy trustees. . . ." Association's Brief, p.1. The court merely resolved a specific and narrow question of coverage under an insurance policy by applying the principles that bankruptcy representatives derive their rights from the bankrupt company and that the terms and conditions of insurance policies remain enforceable after bankruptcy.

The Association does not discuss the Reliance policy or refer to a single case that construes an insurance policy, let alone an "insured vs. insured" exclusion. The Association instead cites authority on the question of a bankruptcy trustee's standing and related issues.[2] Such cases are inapplicable, as no question was raised about the Plan Committee's standing to sue BBC's officers.

Cir. 1983) (state law causes of action against individuals who control the corporate debtor are property of the estate, and thus the automatic stay provision of the bankruptcy code applied); *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987), *cert. denied*, 485 U.S. 906, 108 S. Ct. 1077 (1988) (a trustee of a bankrupt corporation was the proper party to bring an alter ego action against the debtor's shareholders).

[2] *In Re Davis*, 899 F.2d 1136 (11th Cir. 1990) (bankruptcy trustee not entitled to recovery attorney fees incurred in prosecuting action against third-party seeking recovery of allegedly preferential transfer); *E.F. Hutton & Co., Inc. v. Hadley*, 901 F.2d 979 (11th Cir. 1990) (bankruptcy trustee lacks standing to bring action against bankrupt securities broker on behalf of broker's former customers); *St. Paul Fire & Marine Insurance Co. v. Pepsico, Inc.*, 884 F.2d 688 (2nd Cir. 1989) (guarantor of its former subsidiary's debts did not have standing to assert claims against company who purchased subsidiary outside the former subsidiary's bankruptcy proceedings); *In Re Mortgage America Corp.*, 714 F.2d 1266 (5th Cir. 1983) (automatic stay provision of bankruptcy code applies to action by bank against individual who controlled corporate debtor); *Steyr - Daimler - Puch of America Corporation v. Pappas*, 852 F.2d 132 (4th Cir. 1988) (bankruptcy trustee who succeeds to the rights of the debtor can bring alter ego claim); *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988) (bankruptcy trustee lacked standing to bring suit against bank on behalf of debtor's creditors); *In Re Ozark Restaurant Equipment Co., Inc.*, 816 F.2d 1222 (8th Cir. 1987) *cert. denied*, 484 U.S. 848, 108 S. Ct. 147 (1987)

(Footnote continued)

The record below reflects that creditors' claims have not been asserted by the Plan Committee against BBC's officers. Hence, the purported right of a bankruptcy trustee to represent creditors is irrelevant to the resolution of this case.

Strictly speaking, this case does not even involve a bankruptcy trustee. There is no reference in the bankruptcy records or filings, including the Plan or the Disclosure Statement, identifying the Plan Committee as the trustee of BBC's estate. A trustee's alleged right to represent creditors is therefore not even implicated.

Instead of addressing the question of coverage under the D&O policy, the Association asserts that the issue of who may ultimately receive the benefits of the trustee's efforts warrants review by this Court. That issue has no impact or bearing on whether the Plan Committee Action was commenced "on behalf of" the bankrupt entity. The Reliance policy excludes claims brought "by or on behalf of" the insured company, without regard to the identity or status of any person who might benefit from such a claim. The court correctly focused its inquiry on the actual policy wording, which does not in any way refer to BBC's creditors or any other third parties. Who *benefits* from a trustee's acts is simply not a material factor under Reliance's "insured vs. insured" provision. *See*, *Gary v. American Casualty Co. of Reading, Pa.*, 753 F. Supp. 1547, 1555 (W.D. Okl. 1990) ("regardless of to whom the benefits of any recovery on a D&O policy by the FDIC or the FSLIC might directly or ultimately inure, their claims are claims of the [failed] financial institution".)

The Association implicitly admits that the Plan Committee Action was commenced *on behalf of BBC* in stating that a

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(trustee had no standing under bankruptcy code to bring alter ego cause of action on behalf of corporate debtor's creditors); *Koch Refining v. Farmers Union Central Exchange, Inc.*, 831 F.2d 1339 (7th Cir. 1987) *cert. denied*, 485 U.S. 906, 108 S. Ct. 1077 (1988) (trustee of bankrupt corporation was proper party to bring alter ego action against debtor's shareholders); *Jones v. Hyatt Legal Services*, 132 B.R. 853 (Bankr. S.D. Ohio 1991) (trustee failed to state a cause of action against debtor's former attorneys for negligence and fraudulent misrepresentations).

"bankruptcy trustee . . . act[s] pursuant to rights derived from the debtor. . ." Association's Brief, p. 2, which is consistent with the ruling that the Plan Committee was acting on behalf of BBC in commencing the Plan Committee Action.

III. THE DECISION BELOW WILL NOT HAVE ANY SIGNIFICANT IMPACT ON BANKRUPTCY PROCEEDINGS

The Association believes that the decision below will adversely impact bankruptcy proceedings, with visions of creditors racing to the courthouse to seek the proceeds of directors and officers insurance policies outside the bankruptcy proceedings. If such third party claims are brought against the debtor or its property, 11 U.S.C. § 362(a) would automatically bar such actions. In addition, a bankruptcy court has broad and effective power under 11 U.S.C. § 105 to enjoin such actions to protect the estate. These Bankruptcy Code provisions dispel any unjustified concern that enforcing the insured vs. insured exclusion against a bankruptcy representative will somehow induce creditors to bring suits and dissipate the assets of the estate.

Of note, upon the filing of a bankruptcy petition, third-party actions against the debtor or estate property are automatically stayed:

> any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. . .

11 U.S.C. § 362(a)(3).

A bankruptcy court is also cloaked under 11 U.S.C. § 105(a) with authority to protect the debtor's estate and its administration, including enjoining proceedings affecting the estate. *In re Ionosphere Clubs, Inc.*, 111 B.R. 423 (Bankr. S.D.N.Y. 1990); *In re Wingspread Corporation*, 92 B.R. 87 (Bankr. S.D.N.Y. 1988); *In re Apollo Molded Products*, 83 B.R. 189 (Bankr. D. Mass. 1988).

Such remedies can be forcefully applied to creditors' actions seeking recovery of the proceeds of the debtor's insurance

policies, preventing a race to the courthouse by creditors. For example, in *In re Zenith Laboratory, Inc.*, 104 B.R. 659 (D.N.J. 1989), the district court affirmed a stay imposed under 11 U.S.C. § 105(a) on an action commenced by creditors against the debtor's officers and directors that sought recovery of, *inter alia*, the proceeds of the debtor's D&O policy.

In addition, a bankrupt entity's insurance policies are protected by the automatic stay under 11 U.S.C. § 362, thereby ameliorating the Association's concern of a "race to the courthouse" by creditors who are contemplating actions that could trigger coverage under the bankrupt's policies. *Matter of Fernstrom Storage & Van Company*, 938 F.2d 731 (7th Cir. 1991); *Tringali v. Hathaway Machinery Company, Inc.*, 796 F.2d 553 (1st Cir. 1986); *In the Matter of Gulf Tampa, Drydock Company*, 49 B.R. 154 (Bankr. M.D. Florida 1985); *Forty-Eight Insulations, Inc. v. Lipke*, 54 B.R. 905 (Bankr. N.D. Ill. 1985).

In view of the foregoing, the decision below, in holding that the Plan Committee Action is excluded by the insured v. insured exclusion, will not increase the claims flowing from a bankruptcy or impair a trustee's marshalling of the assets of the estate.

CONCLUSION

For the foregoing reasons, the arguments in the amicus curiae brief should be rejected by this Court, along with the petition for a writ of certiorari filed by the Petitioner.

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Respectfully submitted,

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